

926

AN
ENQUIRY
INTO THE
FOUNDATION AND HISTORY
OF THE
LAW OF NATIONS IN EUROPE,
FROM THE
TIME OF THE GREEKS AND ROMANS,
TO
THE AGE OF GROTIUS.

By ROBERT WARD,
OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

Semina nobis Scientiæ dedit Natura, Scientiam non dedit. — SENECA.

IN TWO VOLUMES.

VOL. II.

L O N D O N :

PRINTED BY A. STRAHAN AND W. WOODFALL,
LAW PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, FLEET-STREET.

1795.

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INQUIRY

FOUNDATION AND HISTORY

LAW OF NATIONS IN EUROPE



BY ROBERT WARD

OF THE GREAT BRITAIN

IN TWO VOLUMES

VOL. II

LONDON

PRINTED BY J. JOHNSON, ST. PAULS CHURCH-YARD

1801

ERRATA OF VOLUME II.

<i>Page</i>	<i>Line</i>	
2,	24,	for Agifilaus, read Agefilaus.
55,	7,	for OIKYMENIKOË, read OIKOYMENIKOË,
—,	4,	for Œcuminical, read Œcumenical.
—,	18,	for Du Conge, read Du Cange.
76,	1,	for Papæ, read Papa.
119,	11,	for Edward, read Edmund.
141,	16,	for Muſſulmem, read Muſſulmen.
148,	2,	for Pious, read Pius.
172,	1,	for Montlue, read Montluc.
—,	23,	for firſt ſection of this chapter, read ninth chapter.
182,	19,	for Compte, read Comte.
203,	22,	for Law, read Laws of Nations.
219,	ult.	for touced, read touched,
266,	ult.	for 1262, read 1212.
300,	5,	for puniſhed, read furniſhed.
308, 9, 9,		for Tranſtamère, read Tranſtamare.
325,	9, 11, 14, 17,	for Fædus, read Fœdus.
343,	note (I)	for Lidenbrog, read Lindenbrog,
344,	23,	for there, read theſe.
424,	17,	for evinced, read create.
432,	7,	for Coringius, read Conringius.
447,	10,	before dependant, inſert was.

ERRATA OF VOLUME II.

447	10	For dependent, there was
448	7	For Corrigenda, new Corrigenda
449	17	For Corrigenda, new Corrigenda
450	23	For Corrigenda, new Corrigenda
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THE
FOUNDATION AND HISTORY
OF
THE LAW OF NATIONS,
IN
EUROPE.

CHAP. XIII.

OF THE INFLUENCE OF CHRISTIANITY, AND THE
ECCLESIASTICAL ESTABLISHMENTS.

THE Law of Nations being founded in a great measure upon the systems of morality, good or bad, pursued by certain sets or classes of people; and *Religion* being every where the ground-work of the morality observed, the christian religion, as we have mentioned in a former chapter, (a) may be supposed not merely to influence, but to be the chief guide of the christian law of nations.

(a) See Chap. V.

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It certainly has had so powerful an effect upon it, that wherever it has existed, it has gone the farthest of all causes to introduce notions of humanity and true justice into the maxims of the world. The great proof of which is, that if we compare the conduct of CHRISTIAN nations, with that of nations professing any other religion, (whatever may be their stages of improvement, or in whatever æra of their glory,) the result I believe will be uniform and universal, that the one will be eminent over the other for regularity, equity, and benevolence. In making the comparison, it would be unfair to bring into the account, any of those nations that are still approaching to a state of nature. I pass by therefore all people who may yet be denominated savage, and refer for the sake of greater accuracy, to the most eminent alone of the nations of antiquity, *and of the moderns who live under a persuasion different from ours.

The Greeks under the æras of PERICLES, SOCRATES, EPAMINONDAS, and AGISILAUS; and the Romans, under the reign of AUGUSTUS, (which for polish and refine-

ment has become proverbial,) had advanced, I believe it will be owned, to their summit in every sort of knowledge; the names of SOCRATES and CICERO would alone be sufficient to prove it. Yet we need only refer to the slight sketch already given of their maxims with respect to their intercourse with foreigners, (b) to be convinced of their backwardness in the knowledge of the law of nations considered as a science.

If commerce and the acquisition of riches, by visiting every nation in the known world, could conduce to perfection in this law, the *Carthaginians* promised fair to be, in this respect, the most perfect people of antiquity. The savageness, rapacity, and injustice however, of every kind, which marked their conduct towards all foreign nations, are too well known to detain us longer upon them.

If we look to the *Mahometan* and *Turkish* nations, (though their power has been equal to the greatest, and their Empire of considerable duration,) their ignorance and barbarity

(b) Chap. VI.

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repress all examination, and if they have received any improvement since the days when they first set foot in Europe, it is probably from their connection with people professing the very religion which they most hate and despise.

The same inferiority in this sort of conduct, is to be found even among the CHINESE, so famed for eminence in every other branch of knowledge, and in the science of morals itself. Their wars have always been carried on with *Eastern* barbarity, and their known laws against strangers would alone demonstrate the point.

Among the CHRISTIANS on the other hand, every thing is conducted, or at least enjoined, by received and general laws, upon principles of the most extensive humanity and the most regular justice.

I am aware that this was by no means the case during the centuries before us, of which the picture of manners brought forward in a former chapter, (c) is a sufficient proof; and as CHRISTIANITY had then been long

(c) See Chap. IX.

known

known in the world, it may fairly be asked, of us, if the precepts which it holds forth, are the chief causes of that benevolent and equal morality on which the modern nations pride themselves, how it came to pass that during all the ages that have been mentioned, its effects were not more visible upon the customs of mankind?

The answer is to be drawn partly from circumstances in the history of Europe, partly from the remoteness which is often to be observed between cause and effect. More than three hundred years passed on, before it was possible for CHRISTIANITY to interpose with effect in the laws of the world; those who had the power of making laws, having been so far from adopting its precepts, that it became the object of their most violent persecutions. For four hundred years afterwards, Europe was torn to pieces by the rage of different races of barbarians, who pressed upon one another too fast to allow any time for the milder doctrines of peace to take effect, and who most of them professed a religion whose precepts were the very reverse of those of CHRISTIANITY. The undula-

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tions of that storm remained long after, and the corruptions, the degeneracy, and dissensions of the Church, prevented it from fulfilling its duty even when order had been restored.

The volume of duty however laid before us by CHRIST, continued always the same; and whoever consulted it even in the dark interpretations which ambition or avarice, superstition or ignorance, but too often put upon it, found benefit from it in the end. Its progress, though perpetually interrupted, was finally certain, and mankind at length enjoy, what was intended for them long ago.

Let no one here say with too great confidence, that the order now established in the Law, is owing to extraneous causes; to the natural tendency of men towards improvement; the establishment of government; the extension of commerce; or the progress of the sciences. These can no doubt do much; but could they of themselves alone have reformed the Law of Nations, the Sets of People we have just mentioned, would have presented

sented us with a Code of maxims, and a practical conduct, far different from that which we have been able to discover, even at the very highest points of their refinement. Besides, nations, with one or two exceptions, have for the most part dated their progress in morality from the epoch of their conversion; and in the history of the corruptions of the church itself, it is conspicuous, that morality has been at its lowest ebb, when the church was most abandoned to worldly affairs, or most corrupted by Bigotry and Superstition. The progress of mankind however went on in all other points, notwithstanding their depraved notion of christianity; had it also gone on in the science of morals, the argument would be fairly destroyed.

An example of the truth of these observations is but too near us both in time and place; for it has been obvious, that the people of France were led, first to tolerate, and then to rejoice in the shocking crimes of their Convention, in almost exact proportion as the latter was able to extinguish among them their ideas of religion. They afford us the proof also of the connection between morality

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and the Law of Nations, since the extinction of the one, was the signal for those pretensions and usurpations, which justly drove away their Ambassador from a respectable Republic, (d) and called the greater part of Europe to arms.

Possibly it may be argued that, as according to our own account, effects are long in their production; if the systems of morality which have been given by the antient Philosophers of Greece and Rome; by CONFUCIUS, or MAHOMET, or BRAMA, contain principles which have an equal tendency with Christianity to render their followers more humane and benevolent, the Law of Nations is not so superiourly obliged to that religion,

Admitting the fact for a moment, it will not affect the argument in question, which is confined to the simple circumstance that Christianity has *already* produced a certain effect; and the most it can therefore amount to is, that the other systems, *when practice shall*

(d) America,

have

have accorded with them, will at some future period do that, which they have not yet done.

The fact however does not warrant the supposition. It must be owned that we must always allow every force to the spirit and genius of CODES OF LAW; and if refinement, or notions of justice appear in *them*, it will be fair to attribute a considerable portion of them to the people that could produce them, though their practice may be different from the theory. But the practice of the antient nations was so far from a violation, that it was an absolute fulfilling of the law; nor were any of the instances of injustice that have been mentioned, not supported by the writings of Solon, and Aristotle; of Ulpian and Pomponius, (e) These Codes, however, were composed under whatever influence the precepts of the religions of the countries, such as they were, could be supposed to have; and it would have been better for the world if the concurrence of so many religions, in the praise of whose toleration Mr.

(e) See Ch. VI.

Gibbon has been so copious, could have produced a better effect upon the codes of the Law of Nations then in existence. However opposite might at first have been the conduct of men, they would at last have been improved, though by degrees almost insensible.

Upon the whole then, even upon the supposition that we are not able to trace the effect of CHRISTIANITY upon the Law of Nations *step by step*, and that men were overrun with barbarism long after their conversion; it is by no means consequential that it has not in the end been the great cause of the improvements witnessed by later times; and although in examining its effects chronologically, we are bound to take notice of them under whatever form they present themselves; whether in the immediate improvement caused by an attention to its principles in their purity; or in the strange customs and maxims which arose out of their corruption; still the point holds firm, that if a particular set of morals begets a particular Law of Nations, and those morals emanate almost always from religion, the difference
between

ECCLESIASTICAL ESTABLISHMENTS. II

between the Law of Nations professed by the CHRISTIAN Republic, and that professed by other classes of people, must ultimately have been owing to the CHRISTIAN Religion.

These observations being premised, we shall proceed to take notice of every effect upon the Law before us, which we think can in any wise be attributed to the influence of CHRISTIANITY, or its Establishments; whether they were well or ill directed; whether they enlarged or corrupted the mind; whether they were the instruments of good or evil.

One of the first and best of its effects, was to soften those rugged features which the manners of Europe had assumed from the time of the irruptions of the Barbarians.

Behold, says ADAM of BREMEN (speaking of Denmark) this piratical people, who formerly depopulated the entire provinces of Gaul and Germany, now content within their own boundaries, and saying with the Apostle, We will set our affections on things above! Behold this country, formerly impossible

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possible to be visited on account of its idolatrous worship, now laying aside its natural fury ; listening to the voice of the preachers of truth ; and after destroying the altars of dæmons, erecting those of Christ. (f)

Pour ce que pour la garde et conservation, says an old Treaty, de toutes Polices, Gouvernements, et Bien publicq. n'est rien plus utile, ni plus necessaire, que PAIX, AMITIE, et bon union par ensemble, qui sont mer de tous biens et vertus, *à cause que le service divin est augmenté*, &c. (g)

We have seen in a former chapter, (b) the jealousy with which strangers were viewed by many of the laws of the northern people ; and the cruel rights pretended to against them, have already been the subject of our animadversion. By strangers, I do not here mean those persons merely who were of the

(f) Ecce populus ille piraticus, &c.—Adam. Brem. de Sit. Dan. p. 41.

(g) Tr. d'alliance entre Brabant, Middlebourg, &c.—Recueil des Traiter, i. 735.

(b) Chap. VIII. ad fin.

same state, and chanced to be absent from home ; but foreigners, whose language and manners, and probably the interests of whose country, rendered them suspected, and who on that account, as we have seen, were often treated as if they were declared enemies. In this state of things, the mild spirit of CHRISTIANITY operated with considerable effect, in recommending and enforcing a better order of proceeding. Exclusive of the influence which it must be supposed to have had upon the breasts of individuals, its dictates are often expressly mentioned as the foundation of many of the laws that were enacted to enforce the duties of hospitality. By a law of the Bavarians, preserved in *Lindenbrogue*, the care and safety of strangers is enjoined on the penalty of fourteen shillings. “ Deus nam dixit,” says the law, “ peregrinum et pauperem, non contristabis de rebus suis. (i) By a law of the Hungarians, the lateness of whose conversion (begun in the tenth, and not completed till the thirteenth century) gives us opportunity to mark more immediately the effect of the new religion, benevolence to-

(i) Lindenbr. 412.

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wards strangers is enjoined for the sake, and after the example of CHRIST.

“ Nam Dominus Virtutum, ipse est Rex
 “ Regum. Jubeo, ut per omnia et in omni-
 “ bus, pietate fultus, non solum parentelæ et
 “ cognationi, vel principibus, sive ducibus,
 “ sive divitibus, seu vicinis, et incolis, sis
 “ propitius; verum *extraneis*, et cunctis ad
 “ te venientibus. *Semper illud Domini, in*
 “ *tuis habens, exemplum, misericordiam volo*
 “ *et in sacrificium.*” (k)

So also by the ecclesiastical laws of the Saxons, the Præsbyters of every parish are commanded to use their endeavours to inculcate the duties of hospitality among their parishioners, to feed the hungry, clothe the naked, visit the prisons and the sick, and love and cherish strangers as their brethren, in compliance with the precepts of the Founder of their Religion. (l)

But

(k) Respub. et Stat. Hungar. 164.

(l) Instruat ac doceat ut hospitales sint; ut nullis itin-
 rantibus hominibus domam suam denegent.—Leg. Eccles.
 ap. Wilk. 185.

Esurientibus cibum dare debemus, sitientibus potum,
 nudi operiendi sint, et infirmos, ac qui in carcere sint visi-
 tare

But one of the most immediate effects which Christianity had upon the face of things, was in opposing, and with no inconsiderable degree of power, the forcible current of private war. The universality and duration of this custom has been amply discussed, and we have seen the accession, force and regularity which it received from the feudal constitutions. Kings in vain endeavoured to repress the evil by force. While every family was in arms, the power of the Monarch was small, and the quiet voice of the civil tribunals could not be heard. It was then that the Church, fulfilling its duty, interposed with effect, and the rugged licence of the times was made visibly to bend before the influence of the ministers of religion.

All the codes of law had in general ascribed to CHRISTIANITY the foundation of the most solemn duties they enjoined. The wanton effusion of Christian blood is forbidden by CHARLEMAGNE, expressly upon the various texts of scripture that prohibit mur-

tare debemus; et advenas excipere debemus uti dominus noster, ipse dicebat, &c. Id. 189.

der;

der; (*m*) and many of the *Saxon* laws contain an enumeration of the virtues of a good Christian; among which, to live at peace with men, they command as the most eminent.

Such indeed had been the ferocity of those days, that men pursued their violences even within the very walls of places consecrated to prayer and humiliation; one of the first endeavours therefore of the Church, was to abolish this barbarous custom; and hence throughout the codes of law among all the German nations, the *PAX ECCLESIAE* makes so conspicuous a figure. Among the *Saxons* in the south of England, to fight within the body of a church, was punished with the loss of all that the offender possessed; and to fight to the death, was supposed to be absolutely expiable. (*n*) "How," say the words of the law, "can any man think in his mind, that he can approach the altar, and ask a blessing of the minister of God, if immediately afterwards he is to become impious in word or deed? We

(*m*) Capitul. Carolom. Lib. 5. Cap. 180.

(*n*) Wilk. Leg. Sax. 2.

" have all one heavenly father, and one spiritual mother, which is the Church, and therefore we are all of us brethren. The peace of the Church is the great peace to be cultivated by a christian, and a christian ought therefore to pay it the utmost deference." (o)

Such was the language of the Saxon Æthered, in the opening of the eleventh century : it was imitated by all other codes ; and punishments for breaches of the PAX ECCLESIAE, sometimes corporal, but generally pecuniary, were held out by the Swedes, Danes, French, and Germans. (p) By the laws of the Frisians, a man who was involved even in a legal (q) feud, was to enjoy security in his own house, in the Church, and in going to it and returning from it, under a heavy penalty. (r) By the laws of the Alemanni,

(o) Leg. Ætheræd. ap. eund. 112.

(p) Vide Loccenius, Leg. Civ. Suec. 301. Jus Danic. Lib. 6. 63. The Capitularies are full of them, and the Consuetudines Feudales.

(q) See Chap. XI.

(r) Homo *faidofus* pacem habeat in Ecclesia, in domo sua, ad Ecclesiam eundo, de Ecclesia redeundo, &c. Qui

manni, whoever killed another within the gates of a church, was obliged to acknowledge that he had offended against God, and polluted his temple; and to pay sixty shillings to the service of religion, and sixty to the public treasury. (s) By the English laws also, the walls of a monastery were held as sacred as those of a church. (t)

In the coronation ceremony of the Emperor OTHO, (an. 936) we have a strong proof of the sense of the duties expected by christianity from Sovereigns. When the Archbishop of Mayence girt him with the sword, he said to him in solemn terms, "Receive this sword, and make use of it to suppress all bad christians, and the enemies of JESUS CHRIST; use the power and authority of the empire, which God has given you, to assure the peace of the Church." (v)

hanc pacem effregerit et hominem occiderit, Novies 30. solid. comp. &c.—Heroldus, L. L. Fris. 143.

(s) L. L. Aleman. ap. Lindenbrog. 364. Compare this with the customs of the worshippers of Odin.

(t) L. L. Ætheræd. an. 1014.

(v) Heiss. 1. 56.

This

This was the first step. They proceeded by degrees to inculcate equal reverence for particular days, rendered sacred from the solemn and important events which had happened upon them ; as the death of Martyrs, the call of the Saints, and the chief actions in the life of our Saviour. It is indeed remarkable to reflect with what care, and under what heavy penalties, the exact observance of the Lord's Day was enjoined by such men ; not merely with respect to quarrels, but to labour. The laws of the Bavarians, proceeding *expressly* upon the fourth commandment, punish any one who puts oxen to a cart on the Lord's Day, with the loss of the right-hand ox. Whoever works even at harvest, on the same day, shall for the second offence receive fifty stripes ; for the third offence, he shall lose the third of what he gains ; and for the fourth, shall be deprived of liberty. (*w*) In the same spirit were the laws of the Alemanni, and a capitulary of CHARLEMAGNE, which enjoined that such sabbath-breakers should be carried before the Count, and being con-

(*w*) L. L. Boioarior. De op. dom. die illicit. Heroldus 99.

victed, should remain for ever a slave, *quia noluit Deo vacare.* (x.)

Practice, however, both with respect to labour and to feuds, being too generally at variance with duty, notwithstanding all these expedients, others were fallen upon of a more serious nature ; and however marvellous they might sometimes have been ; however low the influence of the Church must have fallen to be obliged to have recourse to these pious frauds, still their effect, which was for some time successful, and which could only have arisen from deference for religion, demonstrates its power in a forcible degree.

Towards the close of the tenth century, efforts had been made to put a stop to the rage of private war, by depriving the disturbers of peace, of christian privileges, (such as the rights of burial,) and exhorting them to abstain from hostilities, on the sacred bodies of the Saints, which were carried to a great council of Ecclesiastics held at *Limoges* for that purpose. These endeavours failing, an expedient was afterwards fallen upon, which for some time

(x) L. L. Aleman. 38. ap. Lindenbrog. 373. Capil. Carolm. L. i. S. 81.

had the desired effect, and gave rise to that celebrated regulation called the *TREUGA DOMINI*. This truce from war was thus emphatically termed the truce of the Lord, from the supposition then spread abroad, that an Angel had brought a writing from Heaven to a Bishop of *Aquitaine*, commanding men to lay aside their animosities on pain of incurring the wrath of the Almighty. Strange as it may be thought, this supposed miracle had an immediate influence upon mens minds; a general peace took place for seven years; and afterwards it was agreed upon, that *Christians* should never attack one another from the Thursday evening of one week, to the Monday of the next, on account of the circumstance that the passion and the resurrection of our Lord had happened on the intervening days. (y) This regulation became at once general in Europe, was confirmed by the Pope, (who denounced excommunication upon those who violated the agreement;) by various associations for the better

(y) Henault Hist. Chron. de Fr. I. 154.

It is to be wished that Dr. Robertson had pursued his researches upon the origin of the *Treuga Domini* (Note x. Intro. Ch. V.) farther than he has done.

support of it; and by the laws, ordinances, and conventions of almost all the different States.

Many of the deeds are extant. In 1027, we find an association between the Bishop of *Helena*, in Rouffilon, his canons and clergy, and the body of his vassals, women as well as men, by which “omnigenæ hostilitates, ag-
“ gressiones, incendia, et latrocinia prohi-
“ bentur, ab hora sabbati nona, usque in diem
“ lunæ hora prima,” &c. (z). In 1045, there is another league between the Archbishop of Narbonne, the Count of Rouffilon, and other Nobility of the South, for the better observation of the TRUCE OF GOD; (a) and in 1054, another more general, for the same purpose, made by Bishops, Nobles, and ordinary persons. It runs thus:

“ TREUGA, seu PAX PUBLICA, et RELI-
“ GIONIS, per decem Episcopos, duos Comi-
“ tes, una cum Abbatorum, et Clericorum,
“ et quorundam Nobilium, et ignobilium non
“ minima multitudine sancta, pro renova-

(z) Du Mont. Corps. Dip. Un. i. 43.

(a) Id. i. 451.

“ tione,

“ tione, extensione, et strictiori observa-
 “ tione, TREUGÆ DOMINI; qua, præter
 “ alia, omnes hostilitates, ab occasu solis
 “ quartæ feriæ, usque secundæ feriæ illuf-
 “ cente sole prohibitæ fuerant.” (b)

By this deed, among the other just resolutions, the payment of debts is determined upon; and such is their love of peace, for the sake of the Author of their religion, that whoever sheds the blood of a christian, is guilty, it is affirmed, of shedding the blood of CHRIST himself. It is not improbable that the wish to avoid the shedding of christian blood, so often expressed by different Potentates all through the centuries from that time, is derived from this remarkable and characteristic phrase.

The passions of mankind, however, heightened by the little power of coercion possessed by the Civil Magistrate, could not long be reined in; and as that false spirit of religion which evaporates in superstition, is capable of little more than sudden impulses; the rage for war, and the thirst for private vengeance,

(b) Petr. de Marca, Concordia, &c. ap Du Mont. i. 47.

broke out as strong as ever in a very few years.

The Church was again obliged to interpose, by the suspension of christian rights; but their interposition was vain among men who laid no stress on their most solemn engagements; and in France disorder rose to such a height, from the mutual invasions of French, Arragonians, Germans, and Brabançons, that in the South no one could stir out of the fortified places. (c) In this miserable situation, tranquillity was for a time restored by a mechanic of *Puy* in *Auvergne*. This man, a carpenter by trade, being accustomed to pass the eve of the Annunciation in prayer, persuaded first himself, and afterwards the people, that the VIRGIN MARY had appeared to him, and commanded a general peace throughout the world; as a proof of which, she had shewn him an image of herself and Son. The simplicity and religious fear of the multitude soon caught the inspiration; a general peace was resolved upon; a society was instituted on the spot; and Bishops, and men of all ranks, flocked from

(c) Velly 2. 135.

every

every part to partake of that tranquillity which they verily believed had been visibly commanded by Heaven. Many were the effects of this Association, which assumed the name of the BROTHERHOOD OF GOD, and wore a leaden Agnus Dei upon the breast. They forswore drinking, gaming, and luxury, and bound themselves never to take false or dishonourable oaths; they did more; they swore to make war upon the enemies of peace, and for this purpose assembled an army, which defeated in two battles the ravagers whose disorders had occasioned the Institution. They were in the end, however, not merely defeated, but absolutely annihilated themselves.

L'Abbé Velly, on the authority of an ancient manuscript, found at the end of a French Chronicle, which finishes with Charles the Wise, (in the fourteenth century,) gives an account somewhat different from De Launier, (a) and attributes the origin of this transaction, not to fanaticism, but to avarice. It had been the custom, says the manuscript,

(d) Pref. Ordonn. des Rois de France.

for all the Princes and Lords in the neighbourhood of *Puy*, attended by a number of tradesmen, with their goods, to assemble in that city on the feast of the Annunciation, which brought great profit to the Church. The disorders of the times, however, prevented men from travelling; and a Canon of *Puy*, unwilling to lose his usual advantages, instructed a young man, a stranger in the town, to appear disguised like the Virgin to the pious mechanic, which produced all this effect. Whether this story be true or not, (and it must be owned that superstition, rather than true religion, was the cause,) the event proves the influence of Christianity on the customs of the time.

We have seen in a former chapter (*e*) the universal existence of slavery during the earlier ages, and it was shewn to be chiefly owing to the efforts of Christianity that the Institution was abolished. In the attempt to effectuate the abolition, and the success which in the end attended it, we have a full proof of the *general* influence of this religion upon

(*e*) Chap. VIII.

the

the mind, since no passage of the New Testament has absolutely *forbidden* the custom; and it is merely therefore from the spirit of the system of morality there displayed, that men collected what ought to be their conduct in this respect. Commanded to look upon all mankind as their brethren, it wanted little combination of the reasoning faculties to discover that it was incompatible with such an injunction to hold them in chains, exclusive of the benevolent effects upon the heart, which the religion was calculated *generally* to produce, and which, when produced, did that from analogy which was not expressly commanded. After this, and what was said in the beginning of this section, it is of little consequence to object that the custom of slavery remained for a great length of time, or that the Church itself was possessed of numbers of slaves. - We have shewn that the custom of enfranchisement was the effect chiefly of pious and christian motives, and that the example was generally set by the ministers of religion. No law, it must be owned, is to be met with, by which the custom was abolished all at once, nor could such a law have ever been justified: I do not mean on account of the
claims

claims of the rights of property, (which, if they are incompatible with divine institutions, should never be so much considered as to retard their effect,) but on the principles of the very benevolence which it was meant to consult; for the men who would have been the object of it, being thus thrown suddenly on the world, without protection, or the means of support, would have been put in a worse condition than they were in before. It must be owned also, that avarice, and the love of absolute dominion, might have thrown considerable obstacles in the way of the abolition.

Upon the whole, however, it was not unwise to trust it to the voluntary acts of men guided by the spirit of their religion, which, as we have seen, did much in the ages before the period we are now describing, and which continued its efforts long afterwards. At the same time it is to be mentioned, that many of the Saxon laws took it within their scope; and did somewhat towards it, when they prohibited, from *christian* motives, the sale of Christians out of the country, or among Pagans;

gans, NE ANIMA PERDITUR QUAM CHRIS-
TUS PROPRIA SUA VITA REDEMIT. (f.)

The Hungarian laws, under King Stephen, went still farther: "If any one," says that pious Monarch, "influenced by pity, shall have promised liberty to his slaves or handmaids, and dies without having time for a will, his widow or son shall have power to execute his intention, *pro animæ redemptione sui mariti.*" (g)

Hence also, when *Suarez* marks the difference which he very justly holds between the law of nations and the law of nature, he adduces, among other proofs, the abolition of slavery as arising from the positive institutions of the *Christian Church.* (b)

(f) Concil. Æthamense, et Lib. Const. ap. Wilk. 107. 120. 134.

(g) L. L. Sancti Steph. Resp. et Stat. Hung. 177.

(b) Sic enim JUS GENTIUM de servitute captivorum in bello justo, in Ecclesia mutatum est, et inter *Christianos*, id non servatur.—De Legib. ac Deo Legis, L. 2. C. 19. Vide also Grot. D. J. B. et P. 3. 7. 9.

But

But nothing on this subject can be more forcible than the language of the learned Sir Thomas Smith, speaking of bondage and bondmen. "Howbeit," says he, "since our Realme hath received the Christian Religion, which maketh us all in Christ, *Brethren*, and in respect of God and Christ, *Conservos*; men beganne to have conscience to hold in captivitie and such extreme bondage, him whom they must acknowledge to be their Brother, and as wee use to terme him, *Christian*; that is, who looketh in Christ, and by Christ, to have equal portion with them in the Gospell and Salvation. Upon this scruple, the holy fathers and friars, in their confessions, and specially in their extreme and deadly sicknesses, burdened the consciences of them whom they had in their hands; so that temporal men, by little and little, by reason of that terror in their conscience, were glad to manumitte all their villaines. The holy fathers and friars, however," (adds this grave person,) "did not in like sort by theirs." (i)

(i) Commonwealth of Engl. 137.

Dr. Robertson, in a very learned and copious note upon the state of slaves during the earlier ages in Europe, has forestalled much that might be adduced farther on the score of authority, with respect to enfranchisement on christian motives. To that note (*k*) I shall therefore refer the reader, and content myself with pointing out a few other instances, which powerfully confirm the opinion; such as the decree of the third Lateran Council, under Pope Alexander III. by which it is expressly declared, that all Christians ought to be exempt from slavery; (*l*) and a law of Sweden, about the year 1299, known by the name of king Birger's law, by which the sale of slaves is prohibited, expressly on account of the injustice of such a practice among men, *whom Christ made free at the price of his blood.* (*m*)

But of all the effects of Christianity in altering the political face of Europe throughout all its people, and which may therefore

(*k*) Note U. Introd. Ch. v.

(*l*) Henault Hist. Chron. i. 195.

(*m*) Loccen, Leg. Succ.

very fairly be denominated a part of its Law of nations ; none are so prominent to observation during these centuries, as those which sprang from the influence and form of government of the Church.

The Bishop of Rome, by means which it falls within the province of Ecclesiastical History to deduce at large, rather than of a treatise like this, had risen to a height of power wholly unparalleled in the history of the world ; and although at first he was, comparatively, without territory, without troops, without riches, without feudal rights ; he obtained by his spiritual influence alone a despotism, first over the minds, and afterwards over the temporalities of princes, which made him soar far above them all in power and pre-eminence.

It is true, that in all well regulated communities, the effect of Religion has been so great as to reflect considerable respectability upon its ministers ; but in the ages of antiquity, and in countries *not* christian, their influence has been confined within the bounds of a single state. The High Priest, or the Patriarch, has had much sway in the
Hierarchy

Hierarchy of his Country, and much personal influence over the minds of his countrymen ; but it was reserved for the *Christian* nations alone, uniformly to obey, though dissimilar in origin, character, and language, and often divided by opposing interests, ONE PARTICULAR MAN taken promiscuously from among them, to expound their religious duties, and be their director in points of conscience. Nor is this, while divested of extraneous matter, so incongruous or unnatural as it has appeared since the usurpations and tyranny of the Supreme Pontiff. If there is any thing that can unite men and nations of the most discordant characters, it is the profession of the same religion ; especially a religion, the very essence of whose morality is to consider all mankind as brethren. Of such a religion, thus generally professed, every minister, let what will be his country, will naturally have an influence over all communities whatsoever ; he talks to them the same language, he teaches them the same truths, he is clothed with a character which all are bound to respect, and he belongs as it were, to the same state with every one, or rather all states, in this point of view, are indifferent to him. The CLERGY

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therefore, in the natural state of things, are among Christians, absolutely a different body of men from the rest of the world. They form a community, made up from other communities; they are selected to be the channels by which the benefits of a religion common to all, are to be conveyed equally to *all*. The whole world is their care, and universal order and benevolence their objects, and though the unavoidable divisions of mankind into separate nations, superinduce the same sort of divisions among them, (which thus have particular communities allotted to them as their peculiar charge) yet the bond of Union occasioned by one common religion continues always the same, and a Christian Ecclesiastic, whatever may be his country, is *every where* entitled to the reverence and influence attached to his character.

But if this be the case in Theory, (although the imperfections and blindness of men have rendered so noble a theory abortive in the practice,) the Supreme Head of this venerable body, would naturally be intitled to as much greater a proportion of influence and respect, as the head of any other institution possesses
above

above its subordinate members. He is selected to superintend the discipline, the manners, and the qualifications of those, who are themselves the regulators of discipline and manners to the rest of the world. All men therefore, ought fairly to look up to him, as to their father and chief counsellor, and he would in return advise and correct them as his children, with equal severity, and equal love.

Such actually is the picture which the Religious Establishments of *Christian* nations displays to us in Europe during the earlier ages, divested of the *corruptions* which afterwards defaced it. A Hierarchy, neither unnatural, nor unwise!

It does not fall within the scope of our enquiry, to shew by an enlarged detail, how the Patriarchal Church of ROME, attained to this pre-eminence over other rival churches, such as *Carthage*, *Antioch*, or *Constantinople*; or how it rose from the equality in which originally all the Churches of Christianity had been established: Neither is it more relevant to trace minutely the progress of the Pontiff's power over the mind of man, his claim to infallibility, or his pre-

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tended succession to the power of SAINT PETER. It is sufficient that the fact of his superiority did actually exist, and that the western nations chose to consider him as the chief of CHRISTENDOM; to obey him as the successor of the Apostle, and their infallible director in all points of morality, of conscience, and of faith.

The aspect of Europe however came thus to be changed; all the various barbarous nations that had poured in from Scandinavia or Tartary, from the North or from the East, ceased by degrees to consider themselves of different races, and in some measure coalesced under one great bond of union. And although they were independent of one another, and every sovereignty was supreme with respect to the rest; yet for *religious* purposes, and in consequence of *religious* deference, they were willing, all of them, to part with a portion of that Sovereignty, and the whole of what was parted with being united under the Church and swayed by one man, composed a new kind of dominion, as firm and extensive, as it was remarkable.

By

By the Constitution of this dominion, whoever was the possessor of the Papal Chair, was in some measure the director of the affairs of Europe. He was the supposed Mediator between Heaven and the world ; he decided upon right and wrong ; he was the great casuist in all difficulties ; and among sovereign princes, who obeyed no other tribunal, he might fairly be called the *CUSTOS MORUM*. Could it have proceeded without abuse, or was it the lot of mortality to admit of such perfection of wisdom and virtue in one man ; the Institution would have been admirable ! A common Tribunal was thus supplied where it most was wanted ; Appeals lay to it from all corners of Europe ; the weak could be upheld ; the strong could be repressed ; the most divine of all Institutions, *JUSTICE*, had free room to display itself ; and the *FATHER OF CHRISTENDOM* might really have been what his name implied.

The arms which enabled him to enforce the power so granted are too well known to need any elucidation. I shall only observe, that when men could agree, from spiritual motives, to pay such uncommon deference to

an individual who possessed no kind of temporal rights over them ; it was but natural for them to suppose that he possessed the absolute disposal of spiritual rewards and punishments. His dominion, being founded upon influence over the mind, and imagination, the things which have the deepest effect upon them must have been subject, or supposed to have been subject to his will ; and it is not wonderful therefore that his privileges of remitting sins, of depriving men of Christian rights by excommunication ; and of being the sole person to receive them again within the bosom of the Church should be so universally allowed, and attended with such remarkable effects. Nor is that right which was claimed to arm other powers against refractory princes, by any means so great an usurpation (these premises being allowed,) as at first sight it may appear. The power with which men chose to invest their Holy Father, of marking out a man for public execration and public destruction, for the sake of virtue and religion, was really but nugatory, unless he also had the power of calling upon the secular arm to support him. Hence could the Ecclesiastical Establishments

which arose out of Christianity, have really ever existed in their purity, or for the sole purpose for which the *language* of the Theory intended them ; had the papal thunders been only dealt out in the case of some horrid atrocity, worthy of divine wrath ; the interference of different Potentates with one another at the call of the Pope, and the consequent multiplication of the *legitimate* causes for war, would not have been so unjust, or so strange, as they appear in the histories. As long as the Ecclesiastical Constitution was supported by the thrones of Europe, it was but a fair and natural consequence, and it is the abuse of the institution, not the institution itself, which chiefly calls for our animadversion.

When JOHN, king of England, by his violence and depravity, had drawn down upon himself the just detestation of mankind, and the frequent admonitions of the Pope, he laughed at attacks which, while he was at the head of the *whole integral* force of his kingdom, could only, or chiefly, affect his reputation. But when the holy father uttered his final malediction, which disarmed him of half his power, and gave the King of *France*

authority to execute the sentence of excommunication, the Tyrant, humbled by the spiritual and temporal powers united, was forced at last to give way, and to reconcile himself to the Church at the expence of his independence. The consequence is well known. The hand which directed destruction against him when he was supposed to deserve it, was able to avert the blow when he had expiated his offence; and PHILIP AUGUSTUS, though he refused to lay down his arms, was unable to contend with the restored vigour of JOHN. (n)

In this example I am far from the most remote thought of vindicating the motives and conduct either of INNOCENT III. or of PHILIP. I have adduced it merely to illustrate the effect which the deference of Christianity for its head, had upon the Law of Nations at that time; and could we be so happy as to expect that in such a situation the conduct and motives of a Pope, and a king of France, would *always* be wise and pure, I know of no Institution since the be-

(n) Mat. Par. 299.

ginning of mankind, so well adapted to preserve its order, and consequently its happiness. (o)

Such wisdom and purity, however, are hardly compatible, and certainly not very intimate with our natures, and the good which the Popes have ever done, has been far overbalanced by their power of doing mischief. But at the same time it must be owned, even by their enemies, that a vast body of cases might be brought forward, in which this remarkable Law of Nations, such as I have described it, was administered in some measure according to the true spirit of its theory, and we may often observe the Father of CHRISTENDOM, interfering, not improperly, with mediation, advice, and correction, in the affairs and morals of all the neighbouring sovereigns.

We have occasion to remark this at a very early period in the firm and wholesome correction given by St. AMBROSE, Archbishop of Milan, to so powerful a monarch as THEO-

(o) See some judicious Observations of Mr. Barrington on this Subject.—Observ. on the Stat. p. 510.

DOSIUS, after he had indiscriminately murdered seven thousand men at Theſſalonica, without diſtinguiſhing the innocent from the guilty.—Little conſcious of his crime, the Emperor approached the church of Milan in order to pay his accuſtomed duties, when he was met by the Prelate, who abſolutely reſuſed him admittance, and beſpoke him in the following terms. “ You ſeem not to
 “ underſtand, Sir, the greatness of the mur-
 “ der you have committed; and perhaps the
 “ greatness of your Empire will not ſuffer
 “ you to acknowledge your offence. But our
 “ original is the duſt, whence we were taken,
 “ and to which we muſt return. It is not fit
 “ you ſhould deceive yourſelf with the ſplen-
 “ dour of your purple, or forget the weak-
 “ neſs of the body that is covered with it.
 “ With what eyes will you look upon the
 “ houſe of OUR COMMON LORD? With what
 “ feet will you tread his holy pavement?
 “ Will you ſtretch forth thoſe hands, ſtill
 “ dropping with the blood of that unjuſt mur-
 “ der, and therewith take the holy body of
 “ the Lord? And will you put the cup of
 “ that precious blood to your mouth, who
 “ have ſhed ſo much blood by the haſty de-
 “ cree

“cree of an angry mind?” In this animated strain did a minister of religion proceed to rebuke the most tremendous monarch of the earth, till he sent him home covered with shame, and dissolving into penitence and tears at the recollection of the cruelty of his public conduct; (p) let those who are acquainted with the conduct of the Priests of Pagan times towards kings and generals, draw the proper inference.

Another very complete example is to be found during the ninth century, in the history of Lorrain. **LOTHARIUS**, the first king of that country, having repudiated his wife, in order to marry a mistress, **NICHOLAS I.** who then filled the papal chair, interposed for the sake of the good order of which he conceived himself to be the guardian. He told him that his religion permitted him neither to divorce his wife, nor to marry his concubine; and threatened him with the severest censures of the church unless he returned to his duty. Lotharius replied, and the Pope thus opposed, sent two Legates immediately

(p) Bingham. *Antiq. of the Church*, B. 16. ch. 3.

into

into his dominions, who summoned a Council, and determined the matter in his favour. Nicholas dissatisfied with their determination, deposed, of his own authority, the two Archbishops, of Treves and Cologne, and sent another Legate, who gave the affair a re-hearing, and determining it against the king, he was at length obliged to separate himself from his mistress. (9)

The story is little interesting. Nicholas might possibly have had selfish views in doing even what he did, and Lotharius actually succeeded better with his successor ADRIAN II. I mention it, merely to shew the difference which it exhibits, between the Law of Nations of Europe at this time, and that of all other Countries, and of Europe itself, before the firm establishment of Christianity. No nation of antiquity, nor any that was a stranger to Christianity, offers an example of such submission to a man, of whom, as a temporal prince, they were wholly independent.

The history of the succeeding ages, is pregnant with cases of the same kind. Of media-

tion, (not merely as a friend whose own interest is probably concerned, but in the capacity of a father, equally interested for all his children, and anxious to make them fulfil the duties most acceptable to God,) we have an eminent and not ineloquent example in a letter of Pope Alexander, recommending peace between the kings of France and England in 1162. "Among other good things," says the letter, "which render men amiable to their neighbours and pleasing to God, we believe that to be most acceptable, which infuses charity into the heart, and operates as a bond of union to different minds. This good is PEACE, by which hatred is dispelled, rancour allayed, envy driven away, and anger shaken off; which pacifies the mind, conciliates the heart, assuages the breast, and assimilates tempers. This is what we seek to plant, to propagate, and to nourish, among the sons of the Church; this is what we wish to bring to fruit, among Kings, Princes, and Great Men." (r)

IF

(r) Inter cætera bona, quæ hominem amabilem proximis, et placidum Deo reddunt, illud specialiter acceptum fore credimus, quod caritatem cordibus inserit, et animarum vinculum

If we pause for a moment in this place, and recollect the bloody injunctions of the religion professed by the Conquerors of Europe before their conversion, and the manner by which they were commanded to render themselves acceptable to ODIN, (s) the chief of their Gods; we cannot but be sensibly struck with the change, which a few centuries, under the influence of Christianity, had made in the maxims of the world!

The opinion entertained of the Pope's power, when properly used, appears also very forcibly in the affecting appeal made by HENRY II. of England, to the same ALEXANDER, ten years afterwards. He complains to him of the want of duty, and the ingratitude of his sons; that he has the misfortune to be forced to act, as if he hated his own blood; that although he could easily repress their rebellion, yet he

vinculum operatur. Hoc, inquam, bonum, PAX est: quæ procul depellet hodium; rancorem abjicit; fugat invidiam; excutitque livorem; pacat mentes, corda conciliat, serenat pectora, et sociat voluntates. Hanc, &c. &c.
—Rymer, 1. 21. et infr.

(s) Vide Chap. VII. ad fin.

cannot

cannot shake off the father, nor forget his natural affections so much as to have recourse to extremities. In this tribulation he approached the Pontiff, "whom God," he says, "had raised to the office of Shepherd over his people, and who though destitute of temporal arms, is able to defend the patrimony of SAINT PETER with the spiritual sword, and requests his interposition to turn the hearts of children properly towards their parent." (t)

The obligations of RICHARD I. to the Pope, in procuring his release from the prisons of the Duke of Austria and the Emperor, are well known. The former was touched in conscience on his death bed, and commanded his son to return the part of RICHARD's ransom which he had received as his share of the plunder. The young Duke, however, being possibly not so prompt as he ought to have been, in fulfilling the intentions of his father; INNOCENT III who then held the See of Rome, writes to him a letter, the preamble of which describes with

(t) Rym. i. 35.

exactness the quality of parental Mediator in the affairs of the world, with which as we have said the *theory* of the Ecclesiastical Establishments had invested this remarkable potentate. INNOCENT begins thus. "In eo sumus officio, disponente Deo, constituti, ut singulorum et omnium salutem consulere debeamus; et universis petentibus, tam majoribus quam minoribus, in executione iustitiæ providere." (u)

He goes on to exhort him, as he values the salvation of his Father, or his own, to restore the money, and threatens him with excommunication in case of disobedience. The letter had so far the desired effect, that he restored the hostages which had been given for the payment of the money, and would have given back the money itself, had not death prevented the performance of his promise.

In 1193, the same sort of interposition procured liberty to the three daughters of TANCRED, king of Sicily, who had been

(u) Rym. i. 102.

carried off and retained captive unjustly by the Emperor HENRY VI. (w)

In 1214, Simon Montford, the Conqueror of the Albigeois, having unjustly detained the infant son of the king of Arragon in prison, his mother appealed for succour to the Pope, who interposed his authority in her favour, and Montford was forced to yield up the child. (x)

Lastly, in 1337, upon the breaking out of the war between EDWARD III. and PHILIP of VALOIS ; the English monarch before he took the field, thought it right to lay his pretensions before the sovereign of Rome ; he complains to him of having been unjustly deprived of the crown of France ; of affronts offered to his Ambassadors ; of the conduct of the Nobles of the realm, who in their capacity of Judges, had deprived him, when a minor, of his rights ; of the king's favouring the revolt of the Scotch ; and in

(w) Burign. i. 507.

(x) This circumstance obliges even Voltaire to confess, " Qu'il-y-avait des moments bien honorables pour la cour de Rome."—Esp. des Nat. ch. 60.

short, lays the whole of his grievances before him as if he had been regularly chosen umpire between them. (y)

It is not improbable that the custom of APPEAL to neutral powers, on the breaking out of war, (z) arose from this influence of the Pope in the Christian republic. Habituated to lay their grievances before him on all occasions, and to justify their conduct when it appeared to be necessary; the transition was easy from him to other princes; and the connection between the various potentates growing closer and closer, they continued from a sense of its utility, a custom which possibly would not have been thought of, (or at least not so soon,) had it not been for the deference they paid to him at a time when knowledge of one another was not so universal.

The war waged by EDWARD in support of his claim was actually delayed for some months, after it had been resolved upon in Parliament, expressly out of reverence for

(y) Rym. 4.826.

(z) See Chap. X.

the holy See which had advised such a piece of moderation; (a) and after it broke out, we find the Pope through his Legates not wanting in the care which he had professed to have for his children. It was not their fault, that the bloody battle of *Poitiers* was not prevented; and as it was, it was retarded for the space of one day by negotiation. On the morning intended for the battle, says Froissart, when the troops were drawn up, and every officer encircled with his men; the *Cardinal of Perigord* came to the king on full gallop from *Poitiers*, whence he had set out at day break, and with joined hands, and in the name of God, and humility, conjured him to spare the effusion of so much blood as might be spilt, by endeavouring to end the matter by negotiation. (b) This prayer was granted, but though his endeavours did not succeed, it does not the less prove the

(a) *Concessimus etiam ob reverentiam dictæ sedis atque vestram, quod citra primum diem mensis Martii, proximo futurum (nec post, donec contrarium demandetur ex parte nostra, vel per nostros) nulla fiat Invasio, nec præfato consanguineo nostro, &c. &c. malum aliquod inferatur.*—*Rym. 4. 833.*

(b) *Froissart. v. I. ch. 161.*

deference with which the interference of the christian church, was always regarded in the most critical affairs. On the other hand, the Priests of antiquity, were often themselves the Generals of the armies, or, if not, were busied in inspecting the sacrifices, and thereby promoting, as far as in them lay, the operations of war. No case presents a more manifest proof of the change which the customs of Europe had undergone.

The same battle of *Poitiers*, furnishes us also with eminent proof of a custom, in which the papal censures must have been of high service to the affairs of the world. PETER of BOURBON, one of the most illustrious Nobles of the realm, perished there under an excommunication, which had been laid upon him *at the suit of his creditors*, with whom he was deeply involved. The filial piety of his son, Prince Lewis, obtained the removal of the sentence, in order that prayers might be said for the good of his soul: a favour, however, which was only granted, *upon his engaging himself to satisfy the debts of his father.* (c) At the siege of Montpelier

(c) Henault. Hist. Abreg. i. 322.

also,

also, the interference of Religion was visible to the meanest observation.—Taken by the duke of Anjou, that savage Conqueror condemned six hundred of the citizens to death in different ways. Two hundred were doomed to perish by the sword; two hundred by the halter; two hundred by the flames; and the whole of their posterity were to be reduced to slavery.

The consternation which such a sentence, upon so large a body produced, was general throughout the city. Nothing was heard but the most piercing and melancholy cries; the men given over for lost, were intreating pardon; the women, with dishevelled hair, were beating their breasts. In the midst of this desolation, the CARDINAL of ALBANY, assisted by a Dominican Friar, addressed himself to the Duke in the language of his religion. They did not excuse the faults of the city, but rested their intercession entirely upon the sublime doctrine of forgiveness of injuries, the flower of the Christian morality, and which it was reserved, they said, for Christianity alone to make known to the world. The duke was moved at their representations;

the bloody punishment to which he had condemned the city, was changed into a fine ; and from that time, remarks the historian, the military punishments in France appear to have been milder. (*d*)

Another considerable advantage derived to Sovereigns from the Pope's power, appears in the manner in which the observation of Treaties during these times was enforced. As the obedience of men gave the most effectual support to the decrees of the Pontiff, it became common with them, when they entered into engagements, to subject themselves to the penalties of an *Interdict* in case of failure, by which the power of a prince was blasted in its vigour ; and could the frailty of mankind have ensured a proper use of this prerogative, it would have continued one of the most powerful GUARANTIES for the preservation of good faith, that has ever been devised. Used as it was, it displays another singular effect of the *Christian* Institutions upon the customs of the world.

(*d*) Villaret, i. 531, 532.

But

But of all the examples of that regularity which was seen in Europe in consequence of its religious union, those are the strongest which are exhibited by the **ŒCUMINICAL COUNCILS**. These were so called from their being supposed to relate to the whole habitable earth, the word œcumenical, (*OIKYMENIKOS*) signifying *ad orbem terrarum pertinens*. (*e*)

They were accordingly composed of **DELEGATES** from every nation of Christianity, and under this appearance, Europe may fairly be said to deserve the appellation which has sometimes been bestowed upon it of a **REPUBLIC of STATES**. (*f*)

Voltaire has, not improperly, called these Councils the **SENATE of EUROPE**; (*g*) and in fact, they were composed of a **SET**

(*e*) Maimb. Hist. Greg. le grand. 108. & Du Conge. Gloss.

(*f*) De Callieres. Man. de negociier. Ch. 3.

(*g*) Esprit des Nat. Ch. 67.

OF SOVEREIGNS, all intimately connected together ; instructed in one another's customs ; obeying one common law ; and in some measure, governed by one common interest. They were not merely formed of *Ecclesiastics*, nor did they meet solely for the discussion of points of faith. The Emperors of the East and West, and other crowned heads, have sometimes appeared at them in person, and almost constantly by their Ambassadors ; and their rank and seats were marked out, with as much regularity as a subject of so much nicety could permit. Points concerning the whole public weal of EUROPE were discussed in them ; such as the interest, and the precedency of nations ; the conduct of princes ; all articles of faith ; the interests of religion ; and the defence of the faithful against the Infidels.

Their constitution and origin are to be ascribed entirely to the effects of CHRISTIANITY. They were at first no more than *Convocations of the Clergy*, sometimes of a particular State, or, at most, of those who acknowledged some of the patriarchal churches as their head. They were at first also, absolutely

lutely confined to religious matters, the superintendence of which they derived from the Apostles, and which they held insulated among themselves, let what would be the public religion, or toleration of the state they happened to be in. (b) CONSTANTINE however, having adopted Christianity as the national Church, he claimed to himself the superintendence of its discipline, so far at least as the privilege of calling public Councils was concerned; and when his Empire was split into different kingdoms, the Sovereigns imitated his example, and for a number of years reserved to themselves this important right. Thus CLOVIS, who was at the head of the greatest Western dominion of his age, called the Council of Orleans in 511 of his own authority; the Bishops that composed it, are said to have requested him to ratify their decisions. Et par malheur, adds Pasquier, nulle mention de l'Evesque de Rome. (i) PEPIN also, and his brother CARLOMAN, though only Mayors of the

(b) See Puffendorf. sur la Mon. Spir. du Pape. 17, 22. et infr. Putter Constit. of Germ. by Dornf. 1. 20.

(i) Recherches de la Fr. L. 3. ch. 7.

Palace, exercised the same privilege two centuries afterwards. (*k*)

Under Charlemagne, the prerogative, as may be supposed, was rather extended than curtailed; accordingly, at the Council of Franckfort in 794, he presided in person; received the decretals of the Fathers; *confirmed* them, and ordered their publication; (*l*) and when the vast territories of this prince came to be divided into the two great kingdoms of Germany and France, the Sovereigns of the former, who for the most part preserved the title of Emperor of Rome, continued for some time to exercise this prerogative. (*m*)

It was not unnatural however for the Ministers of religion, who held their ministry from God alone, to be jealous of the interposition of temporal power, and by degrees they acquired, or rather resumed, the right of assembling themselves at the call of their

(*k*) Pasquier. 3. 10. Hen. Hist. Chron. 1. 120.

(*l*) Pfeffel Droit pub. d'Allemagne, 1. 35.

(*m*) Heiss. 1. 125. & Pfeffel Droit pub. 1. 192. where he enumerates the rights of the Saxon Emperors.

Chief.

Chief. CHARLES the BALD, favoured their views in France, and in a little time the Pope found himself invested with the exclusive privilege of calling assemblies of the clergy of particular States, *even without the consent of their Sovereign.* (n)

We have mentioned above, the great points of business which presented themselves to Councils thus called, for consideration: but a short attention to the proceedings of two or three of the most famous of them during the ages before us, will render their effect upon the laws of Europe still more visible. The two Councils of Lyons give us the idea of an almost perfect COURT or PARLIAMENT of Christendom, in which the affairs of Sovereigns were discussed, and Sovereigns themselves proceeded against, under all the forms of a regular trial and sentence. The investigator of history, is not to be told the bitter contests of the famous FREDERICK II. and the See of Rome, which gave rise to the first of them. INNOCENT IV. who at that time held the seat of St. Peter, having

(n) Henault, I. 120.

sustained

sustained the quarrel with various success, and being at length driven from Italy by the troops of the Emperor, resolved upon one last effort to decide the affair. His excommunications had hitherto had no effect, he found no secular prince strong, or willing enough, to take up his cause; and he fell upon the daring expedient of declaring the Emperor *dethroned*, in, and by the assistance of, an Assembly composed of the representatives of almost all the States of Europe. In this uncommon enterprize he trusted to the influence of religion to carry him through; but the undertaking could only be conceived upon principles as vast and important, as it was daring in him to imagine them; and the success of it upon those principles, put the Law of Nations in a light in which it had never before been regarded. It was at that time indeed, not new to consider Princes who were excommunicated, as deprived of their temporal rights, and liable to be attacked by any secular power that was called upon, by the Pope: but that a Congress of Sovereigns and Ecclesiastics, should bring to a solemn trial, and sit in judgment upon another Sovereign, who held his rights by the same title as themselves,

selves, was in conformity with no one case that had hitherto happened, no principle that had yet been broached. The expectations of men were therefore fairly exalted, the contest became interesting, and the account of the proceedings of the Council, will shew the customs of Europe in a point of view never so thoroughly seen before, and never witnessed since.

The place of the Council was the first care of INNOCENT; and he pitched upon *Lyons*, as the most central and convenient spot. It was surrounded as it were by Germany, France, and Italy, and was not very far distant from Spain, nor even from England. Hither then, he summoned the dignified Clergy from all the kingdoms of Europe, and invited their Sovereigns to appear there also, either in person, or by their Ambassadors. The object of the meeting which he at first avowed, was to consider of the abuses of the Church, and the defence of Constantinople, then threatened by the Turks. The Ecclesiastics universally obeyed his summons, and of the lay Sovereigns, there appeared the
Emperor

Emperor of Constantinople BALDWIN II. and the Counts of *Provence* and *Tholouse* in person; and by their Ambassadors, the Emperor FREDERICK, the kings of *France* and *England*, and other inferiour Powers. The Sovereignty of the City was yielded to him by the Archbishop, at that time its temporal Lord, and the Knights Templars, (themselves another Sovereign power) formed his body guard.

At the first days sitting, little was done. Many abuses of the Church were proposed for consideration; the patriarch of Constantinople complained of a diminution in the number of his Suffragans, and the English wished to call the attention of the meeting to the canonization of Saint Edmund. The Pope however observed that there were much more pressing matters to employ their care.

There was at that time present on the part of the Emperor, THADDEUS of SUESSA, a man of consummate prudence, and singular eloquence, who united in his own person,
the

the capacities of Soldier, Civilian, and Judge of the Palace. (o) This man knew well the difficulty of the charge allotted to him; he had to contend with an enemy of tried abilities and vigour, whose hatred, by having been pushed to the utmost, was capable of every thing; and who fought with weapons, not only the most powerful, but which he himself was not permitted to wield. He had nothing to rely upon in the exercise of his function, but coolness and patience in suffering what he could not resist, and a firm promptitude to seize every possible advantage. He quickly perceived what was meant by *matters more pressing*; but as it was his business rather to avoid, than to provoke the contest, he affected not to understand them; and to evince his master's zeal, he proposed that he should do his utmost towards the union of the Roman and Constantinopolitan Churches, and should undertake a Crusade in person. "O! how many and how great are his promises!" replied the Pope, "never and no where performed, or to be performed! They are now made merely to

(o) Mat. Par. 663.

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“clude the stroke of the axe which is up-
“lited, and which will soon fall upon the
“root of the tree. But were I disposed to
“listen to him, where can he look for friends
“who will be his securities.” (p) The Am-
bassador immediately pointed out the kings of
France and England. “By no means,” re-
plied the Pontiff, “the Church will then have
“three powerful enemies instead of one; let
“him perform the conditions he has so often
“sworn to and I will then believe him.”
Thaddeus, whose instructions did not extend
to this point, and had not time to prepare an
answer for so important a proposition, was
forced to abandon it in silence and sad-
ness. (q)

This was all that passed during the first
days sitting. In the next however, the Pope
entered the Church of St. John, arrayed in
all the pomp of the priesthood, and with
many sighs and tears bespoke the Assembly

(p) The *Commonwealth* of Europe must have been
brought into no inconsiderable regularity of shape, when such
Securities could have been talked of.

(q) *Siluit contristatus, &c.* Mat. Par. 664.

once

once more. "O ye," said the afflicted Pontiff, "who are passing through life, attend "and observe, whether any sorrow is equal "to my sorrow." He continued a discourse, not ineloquent, in which he compared his five greatest misfortunes to the five wounds of Christ. The first of them was the inhumanity of the Saracens; the second the schism between the Roman and Greek Churches; the third the prevalency of heretical doctrines; the fourth the misery of the holy City; and the fifth (the chief object of his design) **THE CRIMES OF THE EMPEROR.** He accused that Monarch of heresy; of sacrilege; of perjury; of being the enemy of the religion he was sworn to protect; of intelligence with the Saracens, whom he had even established in his territories; and of a criminal intercourse with their women.

Upon this accusation, the Emperor's Ambassador rose up with a firm and intrepid air, and resisted every article of the charge. He observed that it was only for him who discerned all the secrets of man, to know whether his master was really a Christian or not; but judging from his outward acts, that

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there was every reason to suppose he was so, since he complied with the rites of the Church, and above all since he prohibited the vice of Usury, (retorting in this upon the court of Rome, which was supposed to be tinctured with it;) that as for intelligence with Saracens, and establishing them in his dominions, it arose from prudence, in as much as he gained a body of troops for his own defence, and spared the effusion of *Christian* blood; that with respect to their women, he had no personal intercourse with them, but employed them merely in shows, and had even dismissed them when he found his conduct not approved of in that particular. Lastly. in reply to the charge of perjury, which the Pope had endeavoured to prove from letters of the Emperor; he shewed from letters which he also produced, that his Holiness himself was equally guilty, and that his master was not bound to perform his part of a contract, which had not been fulfilled by the other party. He ended by humbly intreating the Assembly to accord him some delay, that he might send to his master and request him to hasten his appearance at the Council in person, which he had long expected;

pected; or to give him fuller powers than at that time he possessed, which would enable him the better to proceed. The Pope refused his request. "I fear the snares," said he, "which I have endeavoured to avoid; I am not yet prepared to shed my blood, nor do I yet deserve a crown of Martyrdom." At the instance however of the Ambassadors of France and England, particularly of the latter, (between whose master and Frederick there was a close affinity;) Thaddeus obtained a fortnight delay, and the Emperor was summoned to come and justify himself in person.

The answer to the Summons was such, probably, as Innocent expected; he pointedly refused to obey; and said that he would never disgrace the Imperial dignity so far as to appear before a Synod, assembled for the purpose of judging him. It does not appear however from M. Paris, from whom I have chiefly extracted this account, that he made any protest against the former proceedings of the Council; and such at least was the opinion of their rights entertained by its members, that the Emperor's obstinacy is said to

have alienated the minds of many of his friends. In the course of the affair, we have farther proofs of the power supposed to be inherent in these meetings. A Council it seems had formerly been summoned at Rome by GREGORY IX. in order to proceed also against Frederick, and that haughty prince had caused many of the prelates going to it, to be arrested. A new ground of accusation was made out upon this, which was treated as the height of sacrilege; and the zealous Thaddeus in vain endeavoured to defend him, by shewing that he had been ready to set them at liberty, had not the Bishop of Palestine and others insolently thundered forth excommunications against him. Innocent, (proceeding all along upon the acknowledged authority of Councils to try the causes of Sovereigns,) demanded of the Ambassador what his master had to fear from the judgment of good men if he was innocent; and Thaddeus avowed the authority of the Court, by confining his objections solely to the members that composed it. He observed that he had every thing to fear from a tribunal wherein his enemies were more numerous than his friends, and where Gregory, the hottest

hottest of them all, was to preside. The Pope however was too able to continue the contest by argument, and perceiving the impression made upon the Assembly, he coolly replied that his defence would avail him nothing, and would only end in the merited DEPOSITION of his master. Thaddeus had also observed the effect which Frederick's refusal to obey had had upon the Assembly, (a spirit which had been ably encouraged by the crafty Pontiff,) and firm as he was, he therefrom trembled at this menace. He again offered to speak but was refused a hearing, and perceiving the approaching victory, he endeavoured to avert its consequences by complaining of the paucity of members that composed the Synod. He also completely discovers to us the opinion entertained in those days of the power of Councils by actually *Appealing* to another meeting, more general, solemn, and impartial. He was answered that it was sufficiently a *general Council*, since it was composed of so many Patriarchs, Archbishops, Bishops, and Nobles, collected either in person, or by their Ambassadors, from all parts of the world; and the Pope proceeded, as the Vicar of Christ, to

declare him guilty of sacrilege, and heresy, and, in consequence, to pronounce him excommunicated, and dethroned. In the preamble to the sentence, he has these remarkable expressions; that the Popes are established over all Christians, for the purpose of rewarding the good, and punishing the guilty, in virtue of which he releases the subjects of the Emperor from their oath of allegiance; he actually calls upon the Electors to proceed to a new election; and as for the kingdom of Sicily, as superiour Lord, he reserves its disposal to his own will.

This terrible sentence seemed to astonish the Council itself, and was heard, says the historian, with a kind of stupor and horror. The aspiring Pontiff however, who was the only person unmoved, (r) proceeded in concurrence with the Fathers to denounce the usual curses against Frederick, who was no longer styled Emperor, and after a number

(r) In Imperatorem Fredericum, sine aliqua palpatione, vel dissimulatione, vel dilationis indultu, talem sententiam excommunicationis in pleno concilio, non sine omnium Audientium et circumstantium stupore et horrore terribiliter fulguravit.—M. Par. 668.

of other acts concerning matters *temporal*, as well as *Spiritual*, the Assembly separated.

Thus finished the celebrated Council of Lyons, the proceedings of which were of the very utmost importance to the European Law of Nations, and which, as its power is wholly ascribable to the influence of Christianity (whether well or ill directed) has a fair title to be noticed in this place. The sentence which it dared to promulgate, was received in Christendom as legal and just; it was published in all due formality in England by HENRY III. the near relation of Frederick, and although that able prince contrived to keep together a strong party in the Empire, the rest of his life was passed in arms with indifferent success. The ecclesiastical princes of Germany, payed so much deference to the sentence, as to elect immediately a new king of the Romans, in the person of Henry Landgrave, of Thuringia; and when that monarch died, which he did in endeavouring to assert his rights, they still passed by the deposed Sovereign, and with the additional suffrages of many temporal princes, who had in general protested against the proceedings of INNO-

CENT, their choice fell upon William Earl of Holland, who survived him. (s)

Thirty years after this, the city of *Lyons* beheld another General Council assembled within its walls; in which, though the affairs treated of were neither of so much importance, nor of so much daring, as those which had employed the attention of the first; yet they were not less general in their effects upon Europe, nor less evincive of the union which these Councils always supposed it to be under, in contradistinction from the rest of the world. The object of the meeting was founded entirely upon the maxims of Christianity, and of Europe; the relief of the Holy Land: the union of Churches; the reformation of manners; and the temporal affairs of almost all the western nations. The members of it were numerous. Besides the Secular Powers, there were assembled near sixteen hundred Prelates: the Pope (GREGORY X.) presided in person; and PHILIP III. of France, who had begun to assert claims

(s) The account of the whole of these proceedings is to be found in Mat. Par. fos. 662, 663, to 679. Heils. 1. 125. Busigny, 2. 88. 90 et infr. & Pfeffel 1. 394. Struv. Corp. Hist. Germ. 1. 466.

to the sovereignty of the city, after coming to meet and to express to him his good-will, left him a guard of Frenchmen under the command of Imbert de Beaujeu, one of his Nobles. Of Secular Powers, there were assembled, the King of *Arragon* in person; the Grand Masters of the Knights Hospitallers and Templars; and the Ambassadors of the Emperors of Germany and Constantinople, of France, England, and Sicily.

In this Assembly much was done for the COMMONWEALTH of EUROPE. A reconciliation between the Greek and Roman Churches was effected; the election of the Emperor RODOLPH was confirmed; and the claims of ALPHONSO, King of Arragon, upon the Imperial dignity, renounced in form. The disputes of the Princes of Italy were taken into consideration; the form of election of the Pope himself was revised; usury was declared infamous, and excommunication was denounced against those who interrupted a Priest in publishing ecclesiastical censures against Sovereigns. (t)

(t) Hist. des Conciles, t. II, 950 et infr.

It would extend this part of our enquiries to a disproportionate length, were we to examine the transactions of the other Councils that were held in Europe; and the intelligent reader would anticipate any inferences that could be drawn from them; exclusive of which, the account of the two Synods above-mentioned, demonstrates sufficiently the point with which we set out, that the profession of Christianity had gone the greatest lengths towards uniting the European nations under an intimate and close alliance, which, but for that, would never have existed. The only institution to which I can compare these meetings of the Powers of Europe, is that of the AMPHICTYONS in Greece; for which, however, there were particular reasons of another nature, drawn from the community of origin in the Pelasgic States; their similarity of language and laws; and their inhabiting an almost insulated country, the political interests of which were in constant opposition to that of their surrounding neighbours. Religion, therefore, did as much for Europe, as a community of race, of language, of laws, and of political interests, did for Greece; and so great was the opinion of the utility of these

General Councils, that it seems to have been the received doctrine, according to M. Paris, that they should be held as a *matter of right* as often as the Jubilees, (which in the ages before us was every fifty years) (v) when, to use his expressions, “ omnia collapsa habent reformari et in bono statu restitui et solidari.” They were of still farther use, in as much as they were the instruments for reforming the abuses which proceeded from the Papacy itself; whose authority was always supposed to be inferiour to theirs.

This was a point of so much importance to the papal interests on the one hand, and the interests of Europe on the other, that it was often contested with great energy: the event, however, declared in favour of the latter, as in reason it ought to have done; since, according to an antient author, whatever power may have been attributed to the Pope, it should be considered as extending over individuals, not over the whole collective body of

(v) In quo decretum et scriptum est, quod non deberet *de jure* concilium generale celebrari, nisi semel infra quinquaginta annos, quod est spacium clausum jubileo. Mat. Par. 662.

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the Church ; “ *Potius Papæ Ecclesiæ, quam
Ecclesia tota Papæ obedire cogetur.*” (w)

This indeed had been in some measure acknowledged by the proud spirit of GREGORY VII. himself, who professed to appeal to a General Council to judge between him and the Emperor Henry IV. Innocent III. also allowed that he could not decide upon the divorce of Philip Augustus, without the support of the same sort of Synod. Their superiority was solemnly adjudged in France by one of the articles of the pragmatic sanction of Charles VII. 1437 : (w) and by the Council of CONSTANCE it was at length finally settled against the See of Rome.

In that celebrated Assembly we find it decreed, in the first place, that a GENERAL COUNCIL, representing the whole Catholic Church, derives its authority from CHRIST himself, and that to such an authority every one “ *cujuscumque status vel dignitatis, etiam
“ si papalis existat,*” is bound to yield his obe-

(w) Pasquier. Recherches de la Fr. L. 3. Ch. 27.

dience.

dience. It was decreed in the second place, and again without any reserve of rank, that whoever refused this obedience, should be condemned to a merited penitence, et etiam “*ad alia juris subsidia, si opus fuerit.*” (x) What these *alia jura* were, may be farther collected from the proceedings of the same Council, (carried, as it is said, *in spite* of the Cardinals,) (y) which actually deposed JOHN XXIII. from the Pontificate; (z) and from those of the Council of Basle, held a few years afterwards, when EUGENE IV. met with the same fate. (a)

But with whatever appearance of regularity and advantage, the power and constitution of councils may seem to have been attended, it must be owned that Christianity, by being abused, gave rise to maxims, too long re-

(x) Labeo Concil. Collect. ap. Du Mont. 4. 25.

(y) Pfeffel Dr. Pub. d’All. 1. 617.

(z) He was declared guilty of Heresy, Simony, and Mal-administration, and cited to surrender himself within a certain time, “*ut ipse cum suis fautoribus in propriis personis compareant, sententiamque suam audiant,*” &c. Du Mont. 4. 27.

(a) Puffend. sur la Mon. Sp. du P. 55, 56, et infr.

ceived,

ceived, which it would be an outrage upon common sense to endeavour to justify. The Pope's power to dispose of the Crowns of Christendom at will, as the successor of St. Peter; to grant new territories to the conquerors or discoverers of them; to annul treaties, when contrary to the interests of Rome; to absolve men from the most solemn contracts; or to preach crusades against all who refused to acknowledge his authority: these, it would be as vain, as it would be ridiculous, to defend with gravity. Fidelity, however, to our undertaking, demands that we should enter upon the detail of them; and ridiculous as they are, they are yet an eminent proof of the effect which any religion, whether pure or corrupted, will always have upon the customs of the nations that profess it.

The foundation of the whole of the Papal usurpations in these points, is to be traced to the forged collection of the decrees of General Councils, and the letters of the Bishops of Rome, supposed to have been made by ISIDOR, Bishop of Seville, a Prelate of learning, who, it was known, had made such a collection in the

the seventh century. Two hundred years after that period, there appeared in the world a book, said to be this identical one, which had not till then been universally known, and which contained matters of the very deepest importance to the whole constitution of the Church, and the maxims of all the European States; in other words, to the European law of nations.

Before the promulgation of this book, the Bishop of Rome had been in possession of no powers that interfered with other Bishops who were independent of his diocese. His pre-eminence, and his functions, had been confined to his own Suffragans; and so far was he from claiming any authority over the temporal Sovereigns of the world, that he was himself dependent upon the Emperors for his very election. That he was the true and only successor of SAINT PETER, or that he derived more power from the Founder of CHRISTIANITY than other Bishops, who all sprang from the same source, had not then been thought of: on the contrary, all Bishops were supposed to be coequal; and so far was the idea carried, that the whole
Church

Church has been thought to have been but one Bishopric, wherein every single Bishop had an equal concern in the whole. "Episcopatus unus est, cujus a singulis in solidum pars tenetur." (b) In this sense, therefore, the authority of the Bishop of *Eugubium* extended as far as that of the Bishop of *Rome*. *Rhegium* was equal to *Constantinople*, and *Tanis* to *Alexandria*; nor are there wanting instances of Bishops exercising their episcopal functions in all great ecclesiastical matters, in dioceses not belonging to themselves, by virtue of the community, and equality of their power. (c) Hence before the establishment of *patriarchal* churches, among other titles which were given to them, we frequently meet with that of *ΑΥΤΟΚΕΦΑΛΟΙ*, or men who acknowledged no head; and even after the division of the Church into Patriarchates, many of these independent Bishoprics remained, such as *Bulgaria*, *Cyprus*, and *Iberia*. (d) The reputation, however, of the Roman City, gave importance to its Bishop in

(b) Cyprian de Unit. Eccles. ap. Bingham 2. 5.

(c) Bingham ib.

(d) Id. 2. 18.

the minds of the world ; for it was still in the power of that illustrious, though fallen capital, to communicate splendour and consequence to those who possessed it. In the Council of Chalcedon, therefore, under the Emperor MARCIAN, the title of ŒCUMENICAL or UNIVERSAL Bishop was given to Pope Leo, by six hundred Prelates. By that Pontiff, however, it was neither accepted nor refused, although from that time the inferior Clergy began to address themselves to him as Sanctissimo et Beatissimo *Universali* Archiepiscopo, et *Patriarchæ* Magnæ Romæ, et Sanctæ *Universali* Synodo. (e) According to some, it was the Emperor Phocas who bestowed upon him the title of *Œcumenical* ; and certain it is that from the time of CHARLEMAGNE, who might almost be said to have been the Emperor of Europe, and who revived the title of Emperor of the West, he had been endowed with the exclusive privilege of consecrating that august Sovereign. This contributed not a little to raise him in dignity above his peers ; and from all these circumstances, the eyes of men were at-

(e) Pasquier. Recherches de la Fr. L. 3. Ch. 2.

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tracted to the antient capital of the world, in preference to the other Patriarchal Sees. (f)

It was in this situation of things that the book above-mentioned appeared; and the little penetration and learning then extant, did not permit men to undertake a critical disquisition. The turbulence and jarring interests of the successors of Charlemagne, which made them of necessity court so powerful an aid as the Church was at all times able to afford, also contributed to the reception of the work.

By this remarkable collection it was made to appear, that the world had formerly agreed to consider the BISHOP of ROME as the successor of ST. PETER; and that as CHRIST had given the keys of Heaven into the hands of the

(f) Upon the constitution of the Christian Hierarchy, see Puffend. Mon. Spir. du Pape. For the precedency of different churches, see amongst others, Sir Geo. Mackenzie on preced. p. 39. Pasquier. Rech. de la France, L. 3. Ch. 1, 2, 3. The latter favours the See of Rome, but without much success.

Apostle,

Apostle, (g) so, as his successor, the Pope also received them; that all ministers of religion, according to the phrase of the prophet Zachariah, ought to be honoured as the apple of God's eye; that all spiritual persons, and their estates, ought to be exempt from the Secular Powers; that the cognizance of all causes wherein religion could have place, such as matrimony, oaths, (*and therefore contracts and treaties,*) should belong to the Bishops, let what would be the rank of the parties, even though it were sovereign; (b) that from all Bishops, an appeal lay to the superiour See of Rome; that the Supreme Pontiff had the right to depose all Ecclesiastics, Archbishops, and Bishops, and appoint others in their stead; and lastly, that in virtue of the divine power thus communicated to him, he possessed the wonderful prerogative of excom-

(g) St. Matth. ch. xvi. v. 18, 19, "And I say unto thee, thou art Peter, and upon this rock I will build my church, and the gates of Hell shall not prevail against it."

"And I will give unto thee the kingdom of Heaven; and whatsoever thou shalt bind on Earth, shall be bound in Heaven; and whatsoever thou shalt loose on Earth, shall be loosed in Heaven."

(b) Puffendorf. ut sup. 23.

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municating Kings and Princes, and declaring them unfit to reign, the expression of God in Jeremiah being applicable to him, " See I
" have this day set thee over the nations, and
" over the kingdoms, to root out, and to pull
" down, and to destroy, and to throw down,
" to build, and to plant." (i)

The arrogation of a power so stupendous would, in other days, have excited the ridicule of mankind for its folly, or their pity for its madness; in these times, however, its effect was serious; and, from the causes above-mentioned, it soon began to be received as law.

That the Temporal Powers should not have immediately resisted it, is not wonderful, since, in all probability, they were ignorant of its extent, and some of them possibly of its existence. Such indeed had been the opinion and weight which almost all Bishops had acquired, that in the primitive church they had been universally chosen the arbiters of men's differences, and their judgments had been confirmed by the Imperial

(i) Jerem. i. 10.

sanction,

sanction, and rendered independent of the Secular Magistrate. (*k*) But that the body of the Ghurch should receive it, is remarkable, since it altered its whole constitution, and surrendered up the independence of a vast number of powerful Ecclesiastics. Who the author of the collection was, has not been exactly ascertained; (*l*) but *Riculphus*, an Archbishop of Mentz, is said to have procured it from Spain in the beginning of the ninth century. In 863, the famous *Hincmar*, Archbishop of Rheims, adopted it as authentic. A Suffragan Bishop having appealed from his Provincial Synod to the Supreme Pontiff, his appeal was allowed upon that ground; and in the middle of the twelfth century its authority was solemnly acknowledged by the decretal of *Gratian*, the faults of which, according to the President Henault, men have hitherto

(*k*) Euseb. de Vit. Constant. L. 4. 6. 27.

(*l*) Putter, in his account of this famous forgery, makes no mention of the name of the author, but merely speaks of the promoters of the scheme, and says it is probable he was some Bishop, &c. Constat. of Germ. i. 98. 100. The very learned Pfeffel (upon what authority he does not say) calls him Benet Levita.

Droit. Pub. d'Allem. i. 103.

in vain attempted to expunge. (*m*) From the time of the publication of this work, the Court of Rome proceeded systematically in its usurpations, and aided by the religious deference and superstition of unenlightened men, arrived at length, in the period before us, to that wonderful height of power, which interfered with, and almost governed the affairs of all the Christian nations.

It was in the eleventh century that these usurpations, which had thus before taken root, were first brought into life and strength; and the well-known enterprizes of the aspiring HILDEBRAND, so celebrated under the name of GREGORY VII. by humbling both the clergy and the laity of Christendom,

(*m*) Hist. Chron. i. 193. Puffend. Mon. Spir. du Pape 28. It was not till the reformation had liberated one half of Europe from the yoke of Rome, that men began actually to question the authenticity of this supposed book of Isidor; a literary contest was then broached upon it, in which the Catholics were obliged to confess that the work was spurious, and that there were above fifty interpolations in the decrees of the Councils. Putter. ut sup.

It is of little consequence to the subject before us, whether the collection was genuine or not; it being sufficient for our point, that the work was so received,

seemed

seemed to emulate the power of the antient Emperors.

It does not fall within our subject to trace the steps by which he proceeded ; it is sufficient to remember, that he was the first of the Pontiffs who arrogated to the See of Rome the right of Investiture ; by the extension of which, every Sovereignty of Europe yielded to the successor of SAINT PETER, (as he was now supposed to be) one of the most ample and important of their prerogatives. (n)

GREGORY was the first also who exercised the pretended power of deposing Princes, (o) and of granting or withholding kingdoms in consequence of the Christian world's being thought to be the patrimony of the great Apostle ; a power of coercion and of remuneration so abundant, that he considered mankind as more intimately dependent on him than they had ever been upon his predecessors, and confined, in consequence, to himself, what had hitherto been extended to

(n) Pfeffel i. 264, 291.

(o) Heiff. i. 76. et infr. Maimbourg. vie de Greg. le Grand. 163.

all Bishops, the distinguishing name of Papa, or Father. (p)

The manner in which he commenced his operations evinces the boldness of his spirit; and the consummate knowledge he had acquired of the minds of men. The strongest and most vigorous Sovereign in Europe, both in dominion and personal character, was the first object of his attacks. And indeed, the constant opposition of their interests, and the thousand jarring claims that arose between them, made it necessary for him to humble the Emperor, before he proceeded to the rest of the Potentates around him. The doctrines of Isidor's collection were, therefore, every where promulgated; (q) the reverence paid to the memory of SAINT PETER, was transferred to the crafty Pontiff; and he suc-

(p) Le Cointe Annales. Greg. VII. Pasquier. Rec. de la Fr. 1. 3. imagines *Papa* to be a Contraction for *Pater Patrum*.

(q) Les fausses Décrétales que le Diacre Benoit Levita avoit forgeés, sous le nom d'*Isidorus Mercator*, et que l'Archevêque Riculfe de Mayence répandit en Allemagne, furent erigées en loix fondamentales de la Constitution Ecclésiastique. Pseffel. 1. 103.

ceeded in tearing from Henry IV. the right of Investiture, which, it was held, could not properly belong to any one not in holy orders; confounding in this, the right to invest a man with the spiritual character of Priest, and the temporal right to a particular benefice. (p) In the course of the contest, we have reason to observe the marked progress which the sense (though a mistaken one) of the Christian religion had made in the hearts of men. The Princes of Germany, while they defended most strenuously the independence and rights of their Sovereign, agreed in a position as universal, that *apostacy* from the Christian faith was a fair ground for deposition. A letter, addressed to Gregory from the Diet of Worms, remarks expressly, that according to the tradition of their fathers, a Sovereign can only be judged by God himself, though they acknowledge that he may be deposed for one crime, namely, that of *abandoning his religion*. (q)

As the active spirit of Henry, however, had not permitted him to part with this im-

(p) Puffend. ut sup. I. Heiss. I. 76, 77.

(q) Hen. Hist. Chron. I. 170.

portant prerogative, without a long and vigorous resistance, Gregory had recourse to those powerful weapons with which the Pontiffs had now begun to arm themselves effectually; and in the year 1076, he thundered down upon the German Monarch the sentence of excommunication, so futile, when unsupported, but so dreadful, when seconded, by a sense of religion among the laity. In the preamble to this terrible sentence, he addresses his Apostolic predecessor, and tells him, "he knows he was called against his will to the government of the Church, and would rather have led a wandering and humble life; (*r*) but nevertheless, being invested with power for the sake of Christianity, he thinks it right to punish its enemies." In consequence of this, the Emperor, it is well known, was forced to give way, abandoned by men whose religion would not permit them to obey him; another Emperor (Rodolph) was chosen in his place, (*s*) and he was obliged to submit to the most abject humiliations, before

(*r*) Baron. Annales. an. 1076. Labeo. Concil. Collect. 10. 24.

(*s*) Heiss. 1. 80.

he could reinstate himself even in a part of his former power. (t)

From that time, excommunications and depositions were dealt forth largely, and with various success, by the Court of Rome; and, during the period we treat of, there was hardly a Sovereign in Europe who did not feel the weight of this wonderful power. One of the most remarkable examples of the insolent confidence in the opinion thus raised by

(t) The following is the exulting and proud account given by Gregory himself to his Clergy, of the miserable state to which he had reduced the most powerful Monarch of the world; though quoted in other works, it comes too obviously within our subject to pass it by:—"Per triduum ante portam castris, deposito omni regio cultu, miserabiliter, ut pote discalceatus et laneis indutus persistens, non prius, cum multo fletu Apostolicæ miserationis auxilium et consolationem implorari destitit, quam omnes qui ibi aderant, et ad quos rumor ille pervenit ad tantam pietatem et compassionis misericordiam movit, ut pro eo multis precibus et lacrymis intercedentes, omnes quidem insolitam nostræ mentis duritiem mirarentur; non nulli vero in nobis, non Apostolicæ sedis gravitatem, sed quasi tyrannicæ feritatis, crudelitatem esse clamant."

Epist. Greg. Baron. an. 1077. Labeo. Concil. Collect. 10. 158.

the

the Popes, appears about a century afterwards, in the conduct of CELESTINE III. who was then eighty-six years of age. The Emperor Henry VII. coming to Rome, to be crowned and consecrated by the hands of the Pontiff, knelt down with devotion before his chair, to receive the diadem which Celestine had placed between his feet; and no sooner was it fixed on by the hand, than it was struck off by the foot of this proud old man, who left it to the Cardinals to take it up, and restore it to the Emperor.

Baronius, in relating this action, confesses it was indecent, but excuses Celestine, by observing that it was merely a display of his legal power, to confer, and to take away the Imperial Crown. (v)

Hitherto, however, the ambition of the Holy See had been confined to matters merely spiritual; or if it had contrived to attain to almost sovereign power over the world, it was through the intervention, and by a crafty management of its prerogative in things, as

(v) Baron ad an. 1191.

they

they were called, divine ! But the year 1300 beheld the papal pretensions stripped of all disguise, and openly aspiring to the exercise of supreme power in *temporals*, as well as *spirituals*, under BONIFACE VIII. That Pontiff is described as able, proud, violent, and boasting ; and having observed the almost uniform success of every design which the Court of Rome had conceived, when backed by superstitious deference, he thought it needless to proceed with the management and caution of his predecessors. He therefore openly laid claim, as Vicar of Christ, to supreme authority over all the Monarchs of the earth, in things *independent* of religion. He appeared on the celebration of the first jubilee at Rome, (when it was supposed that there were 200,000 pilgrims from all parts of Christendom within the walls,) in the habit of a lay Emperor ; a crown upon his head, a sceptre in his hand, and the Imperial buskins upon his legs. He continued alternately to shew himself, now arrayed in the habits of Pontiff, now of Emperor, in order to prove to the world that he united the *temporal* as well as the *spiritual* supremacy in his own person. Had he done nothing more than this, he

would only have attracted the ridicule, or possibly the relentment, of his neighbours ; but his nature was too aspiring to be contented with the mere ensigns of the power which he grasped at, and he immediately engaged in one of the hottest contests that had ever agitated the Papal See. It attracted the eyes of all Europe, and employed the utmost exertions of the most powerful of its Monarchs, and therefore well deserves to be mentioned here.

Philip IV. surnamed the Handsome, at that time filled the throne of France ; a Prince also of ability and violence, and of a spirit particularly independent. Between him and Boniface there were many subjects of difference, more especially concerning the government of the French Clergy, and the right of taxing them at pleasure, to which the Pope pretended, and which the King absolutely forbade. Philip also had made an alliance with the King of the Romans, the declared enemy of Boniface ; and, for this, his Ambassador at Rome was loaded with the most virulent invectives against his master. The Ambassador replied with vivacity ; he ventured

tured to reproach Boniface himself with the many scandals of his life; and observed, that he saw with grief the evils which his ill-placed pride, and unfounded claims, would occasion, if he embroiled himself with a Prince, equally informed of his rights, and jealous of his authority.

This was the first blow. The Pope sent immediately into France the Bishop of *Pamiers*, a Legate whose character very well represented his own, and who behaved with such insolence, and denounced such terrible things in the name of his master, that being born a subject of France, Philip thought proper to order him to be arrested, and delivered over to the Archbishop of Narbonne, his Metropolitan, for punishment. Outraged at this, the Pontiff immediately issued forth his Bulls, with which he thought to destroy the offending Prince; and, by the first of them, commanded him in peremptory terms to send the Prelate to Rome for judgement; which being nothing but his legal privilege, was instantly complied with. Determined however to assert his claims to the utmost, he sent forth another, beginning with
these

these remarkable words : “ *Fear the Lord, and keep his commandments. We chuse to acquaint you, that you are subject to us in temporal as well as in spiritual matters ;*” which so offended the King, that, thrown quite off his guard, he forgot the dignity with which a Monarch ought to defend his rights ; and instead of calmly shewing the futility of his pretensions, he imitated, or exceeded in his answer, the insolence of which he complained. It begins thus : “ Philip by the grace of God, King of France, to the pretended Pope Boniface, little or no health ; we chuse to acquaint your folly that we are subject to no one in temporals, and all who think so must be out of their senses.”

Boniface replied in a Bull, which contained an ample and sufficient display of the whole of his claims. “ Hear,” says he, “ my son, the commands of your father ; open your heart to the precepts of a master, who holds the place of him, who is Lord and master of all ; receive, with pliability, the advice of the holy Church your mother ; execute, with fidelity, her orders, and submit, with respect, to her will, that is, to ours.”

He

He then enters upon the detail of disorders in his kingdom, many of which were purely *temporal*, such as those of the Mint; exhorts him to penitence, and summons his Clergy to Rome, to deliberate on a reform. In another Bull, addressed to the Clergy themselves, he repeats the summons, and calls them to consult upon the injustice done by the King and his officers *to the Nobility*, as well as to the Clergy.

Alarmed at this vigour, Philip actually began to fear lest the religious prejudices of the age should support the Pontiff, and by that means destroy his whole authority within the kingdom. To balance therefore the power that was thus rising against him, he resolved to have recourse to his people collected together; a resolution which was the first occasion of those celebrated Assemblies called the States General of France. (*w*)

(*w*) There have been warm disputes among the Critics on the French History, upon the chronology of these meetings; but see PASQUIER, *Recherches de la France*, L. 2. Ch. 7.

The event of this Assembly was favourable to the King; and all the three Orders sent letters to Rome, to assert the independence of their Monarch: yet such was the reverence paid to a Power which was esteemed little less than Apostolical, that notwithstanding this, and the express prohibition of Philip, *forty* of his Prelates obeyed the Pope's summons, and attended the Council at Rome, which was absolutely expected to *dethrone* their master. In this Synod was promulgated the famous Decretal called UNAM SANCTAM, from its commencing with those two Latin words; in which it is *declared* and *pronounced*, that the Church is one, holy, catholic, and apostolic; that it has but one head, which is the POPE; that there are in this Church two swords, the *spiritual* and the *temporal*, both of which are wielded by the ecclesiastical power; that the temporal authority is therefore subservient to the spiritual, which is its founder and judge; that there cannot be a doubt as to this point, without falling into the errors of the Manicheans, (which admitted two principles, of good and evil;) and that it was even necessary for salvation to believe, that *every human creature*
is,

is, and ought to be subject to the Pontiff of Rome.

The effect of this remarkable and precise Decretal, the Abbé Fleury has endeavoured to dissipate, by observing that nothing in fact was *decreed*, subversive of the temporal authority of Sovereigns. He confesses that all the preamble tends to assert that doctrine; but the things resolved upon, he imagines to be merely the position, that every human creature ought to be subject to the holy father; which no one can deny, says the Abbé, *provided it is confined to spirituals. (x)*

His criticism does not appear convincing, since it is the very *proviso* which is contested. The preamble must always be compared with the decree, in order to explain its meaning; and if we do this, whatever might be the real law that was received in the world, nothing perhaps can be more succinct or fixed than the meaning of the Court of Rome upon the subject.

(x) Histoire Eccles. 19. 37.

As a proof of it, Boniface, in consequence of the decree, appeared armed with full powers, and issued another Bull, by which he declares that all KINGS, EMPERORS, and other Sovereign Princes, whoever they may be, are subject, like all other men, to be summoned before the Apostolic Courts, for every sort of cause; for such, says he, is our will, "*we who, by the permission of God, command the whole Universe!*"

Bold and unreasonable as these claims were; ridiculous even as they now seem; imperfect, and illegitimate, as the Council might appear which pronounced them; it is curious to observe their effect upon the kingdom against which they are directed. One would have thought, that the very impudence of the pretension would have been sufficient to have defeated itself; and that the French Monarch might have let it pass off without notice, as the ebullition of folly or madness. Not so: he was reduced actually to defend himself, not so much by *resisting* the claim, as by attacking the *person* of the claimant; and was forced, instead of meeting, and deciding the question upon the spot, to appeal to the
same

fame Tribunal, only composed of other Judges.

In a second meeting, therefore, of his States, he loaded the Pontiff with the most virulent abuse ; he accused him of every sort of crime and heresy ; of being an infidel, a forcerer, a consulter of dæmons, a Simonack, a murderer, and a sodomite ; of having said he would rather be a dog than a Frenchman, and would ruin the whole of Christendom, or destroy the French pride.

By this artful conduct, he moved his people to request him to procure the convocation of a General Council ; to which, and to a future Pope, he might refer the matters between them ; and, affecting to acquiesce, he prepared a formal act of *Appeal*.

In the procuration of this, he intreated the Bishops to join him, and protesting against the authority of the last Council, and of the person who called himself Pope, he declared he would only abide by the decision of the new Tribunal. The Clergy consented to the appeal, but added, in express terms, that they

would not make themselves parties against BONIFACE. They promised, however, to support the King in the contest against whatever violence he might undertake; a promise which, it is remarkable, Philip was forced to requite, by swearing *on his soul*, in conjunction with the Queen, and his children, to protect them, in return, from a vengeance which, according to the received law of the Church, they knew would be legitimate.

Exclusive of the assistance of the Clergy, the King thought he could not be entirely secure without the support of the rest of his kingdom; he therefore promised his protection, in the same solemn manner, to the nobility, and all those in general who should give their consent to the convocation of a future council, and he sent commissioners all through the realm to receive this consent from provinces, cities, universities, and chapters. These were precautions which it is wonderful so powerful a Monarch should have been forced to take against such chimerical pretensions, had he not been sensible that the superstition of the times might probably bear out his enemy in his unreasonable enterprise. Upon

the whole view of this affair, we are indeed often obliged to observe, that the conduct of Philip, at the moment when he seemed most sensible of his rights, and most determined to support them, is the greatest proof of the Pontiff's power. Had the point of dispute been incontestable, or had he not been much afraid of the religious veneration of men for the See of Rome, even in its most extravagant undertakings, there would have been no occasion for him thus to have armed himself. Above all, his endeavours to *depose* the Pope, and his appeal to a future Council, instead of resisting their authority upon points which he contended were so clear in his favour, are strong proofs, afforded by himself, of the influence we are noticing.

The rest of this remarkable affair is equally unsatisfactory in determining the point. BONIFACE, true to his design, assembled a Consistory in which he purged himself, by oath, of the crimes laid to his charge; he persisted in his resolution to punish the King, notwithstanding what he called his *frivolous* appeal; he declared that no Council could be assembled without his own consent, in which he was

right, according to the received usage ; and lastly, that there was no one on earth greater than himself, nor even his equal ; in which, according to the corrupted sense of religion then extant, he was not far wrong.

He went on, in different Bulls, to say, that, as Vicar of Christ, he had the privilege of governing Kings with a rod of iron, and could bruize them like a potter's vessel ; but that, as a good father, he meant only to give them salutary correction ; he therefore, for the present, excommunicated Philip ; absolved all his subjects from their allegiance to him ; threatened them with curses if they obeyed him ; declared him incapable of command ; *annulled all Treaties which he might have made with other Princes* ; bade him return to the yoke of his legitimate obedience, and trust entirely to the mercy of his Lord, if he wished to avoid a punishment still more severe ; by which he meant the only one that remained, a regular and formal deposition.

The maxims of the world were too little settled to suffer Philip to be at rest under this danger. The old Law of Nations had gone such lengths

lengths with respect to the papal authority that he knew not where it might stop ; and the firm activity of Boniface made him tremble for the event of an affair which he had been so long unable to settle. The danger indeed had now become instantaneous ; for Boniface had offered the kingdom of this rebellious son of the Church to the Emperor Albert, who himself had but just quitted rebellion, and who probably was only withheld from accepting the offer, by weakness. Philip therefore resolved upon an action, which no Monarch in Europe, since the foundation of the papal power, had ever dared to attempt. He detached COLONNA and NOGARET, (the former an Italian of power, and the declared enemy of Boniface,) to surprise that Pontiff in *Aganie*, the place of his nativity, whither he had retired ; and they executed their measures so well, that they overcame his guards, carried fire and sword into his palace, seized upon his treasures, and treated him with an indignity amounting to brutal. (y)

(y) Colonna went so far as to strike him on the face ; he was placed upon a colt, without saddle or bridle, and mounted with his face towards the tail,

Nothing,

Nothing, however, could overcome the spirit of this extraordinary man ; he resolved not to convoke any new Council ; he persisted in his claims of temporal supremacy over the world ; and he absolutely refused to renounce the papacy which was demanded of him. " You may kill me," said he several times, stretching forth his neck, " for I am " in your power ; but if I must die, I will at " least die Pope."

The event of the affair rather got rid of, than decided it. Boniface, rescued by his countrymen, died, as it was said, of grief and mortification ; and his successor, Bennet, though devoted to France, and represented by the historians as a just Prelate, thought it right to give absolution to Philip, and to condemn the faithful Nogaret to banishment in Palestine, which was meanly suffered by his master. He also deemed it necessary to take off, in form, the censures which had been laid upon the realm, before it could return to its pristine soundness among the States of Europe. (z) Such was the end of this remark-

(z) For the account of this contest between Boniface and Philip, see Fleury. Hist. Eccles. F. 19. Walsingham. ad an. 1303. Velly 4. 82. et infr.

able dispute, which was founded solely upon the power already universally attributed to the See of Rome by the LAW OF NATIONS; a power, as we have seen, almost raised, or at least formed into a system, by the political abilities of GREGORY VII.

It was under that daring Pontiff also, that Europe became acquainted with another and a very powerful effect of religious deference for the Vicar of Christ, in the privilege assumed by the Court of Rome, to be the sole disposer of earthly kingdoms. An epistle of his is still extant, of the date of 1073, to the Nobles of Spain; in which he asserts his claim to the whole of that kingdom *as the patrimony of Saint Peter*; observing, that although the greater part of it was in the possession of the Moors, yet it had formerly been under the dominion of the Christians, and therefore of the Apostle; “that what once
“ had belonged to him, must still belong to
“ him; and he therefore grants to the Count
“ de la Roche, all that he can conquer from
“ the Saracens in that country.” (a) He carried his pretensions so far, as to extend

(a) Epist. ad princip. Hisp. Baronius. 1073.

this claim to the States already possessed by Christian Princes in the kingdom; all of whom he required to acknowledge themselves his feudatories, to quit the gothic liturgy, and to receive that of the Romish Church. They replied, however, with becoming spirit, that they were independent Sovereigns, who owned no superiour on earth; and for this time the designs of the See of Rome were defeated in Spain. (*b*)—In the year 1300 a similar claim is laid to the whole kingdom of *Scotland*, at that time lying open to various pretenders, a letter of BONIFACE to EDWARD I. of England, stating, that Scotland had belonged to the Church, “pleno jure, et ab antiquis temporibus.” (*c*)

The transactions preliminary to the conquest of *Ireland*, under HENRY II. furnishes us not only with a strong example of this received power, but of another effect, and that a most pernicious one, which the corruptions thus introduced into the

(*b*) Mod. Un. Hist. 16. 218.

(*c*) Labeo Concil. ap. Du Mont. 1. 224.

Church establishments had upon the law of nations. According to all maxims of justice and regularity, the inhabitants of every country have an absolute right to the dominion of the soil, unless they themselves have surrendered, or forfeited it, by some act of their own; nor can the profession of this or that set of customs, or of this or that religion, give any title to their neighbours to invade them, so long as they have furnished them with no other cause. The abuse of Christianity, however, and the usurpations we have been treating of, operated upon, and effectually changed this part of the law. HENRY II. wanting a pretext to subjugate a territory so convenient by geographical position for his own States, gravely asks leave of the holy Father to make a conquest of Ireland, in order, as he says, “*to extirpate the vices of the inhabitants, and bring them into the way of truth.*” “*Rogavit Papam Adrianum, ut sibi liceret Hyberniam Insulam, hostiliter intrare, et terram subjungere, atque homines illos bestiales, ad fidem, et viam reducere veritatis, exterpatibus ibi plantariis vitiorum.*” (d) The answer of the Pope is a full grant of his request, and upon

(d) Mat. Par. 95.

the

the same principles. He tells him, that he is about to lay up for himself an eternal reward in Heaven, for extending the bounds of the Christian Church ; that there cannot be a doubt but that *Ireland*, and all the Islands which have received the light of Christ (who is the Sun of justice,) must belong to the jurisdiction of SAINT PETER, and he therefore grants him the permission he demands, upon the stipulation however, of the usual tribute to the Apostle, of a penny a year for every Christian family. (e)

About the same time, the Venetians having sided with the Pontiff against the Emperor FREDERICK BARBAROSSA, and gained the naval battle of *Lignano* ; the Pope, to preserve the memory of it, sent a present of a ring to the Doge, commanding him to throw it into the sea, which out of his apostolic power, he thus gave him to wife ; and hence arose the well known annual ceremony of the marriage of the Doge of that State with the Adriatic. (f)

(e) Mat. Par. 95. & Rymer's Fæd. 1. 15.

(f) Hen. Hist. Chron. 1. 196.

The right assumed by the Christian nations, of reducing to their obedience, *for the sake of converting them*, all people who professed a faith different from their own, continued for a great length of time in Europe. It is still a received doctrine among those who submit to the establishment of the Inquisition, and thus the mild tenets of Christianity, which seek for proselytes through the sober means of conviction, were made to assume all the fierceness, and absurdity of Mahometanism, which decides upon belief by the scymiter.

The tyranny and injustice of the Spaniards towards the American nations, were defended upon this ground ; and every investigator of the affairs of Europe has been struck with those remarkable *grants* made by the Holy See to Portugal and Spain, of all the countries they should discover, the one to the East, the other to the West.

Both grants were considered as valid by the law of the times, and the former was gravely reasoned upon as such, by the Ambassadors of Portugal to Edward IV. at the close of the fifteenth century. Some English
mer-

merchants, having endeavoured to open a trade with the coast of Guinea, Ambassadors were sent to the Court of London, to state the right to that country conferred by the Father of Christendom, upon the Portuguese, and EDWARD, upon such authority, not daring to continue his enterprize, instantly ordered his merchants to desist. (g)

The grant to Spain gave rise to proceedings, and to reasoning, so extravagant, that I cannot help setting them before the reader, though at the expence of extending this account already but too long.

Ten years after the discovery of the main land of America by COLUMBUS, attempts were made to settle it. Two governments were marked out by Ferdinand for two adventurers, who consulted the most eminent Lawyers and Divines in Spain, upon the manner of taking possession. By these wise men it was determined, that as soon as they arrived, they should require the natives *to subscribe to the articles of the Christian faith, and*

(g) Hackluyt's Voyages, v. 2. 2d pt. p. 2.

the supreme jurisdiction of the Pope over all the earth, which if they did not do, they were to be reduced to slavery by fire and sword. In consequence of this, OJEDA (one of the adventurers) on his arrival, published a proclamation, by which he notified to the inhabitants, that he was the servant of the kings of Leon and Castile, the conquerors of barbarous nations ; that God had created Heaven and Earth, and one man and one woman, of whom all are descended ; but as their posterity were scattered about in various kingdoms, God had given them in charge to one man, named SAINT PETER, whom he had constituted, Lord of the whole race, and commanded to reside at Rome as the most proper place for the government of the world. That he was the judge of all Christians, Moors, Jews, Gentiles, and all sects whatsoever ; that he was called the POPE, which signifies ADMIRABLE, GREAT FATHER, and GUARDIAN ; that this power, and this appellation, had been transmitted to his successors ; that one of them had made a grant of the Islands, the Terra Firma, and the Ocean, to his Sovereigns Ferdinand and Isabella, in deeds which the Inhabitants might see if they pleased ; that thus they

had already become Lords of the Islands, and the people he then addressed, were bound to obey them in the same manner ; which if they did not do, he would take them wherever he could find them, *and treat them as rebellious subjects.* (b).

Other States, if they did not follow the Spaniards in the extremes of cruelty, at least proceeded in the discoveries they made in the new World, upon the same principles. In the patent granted by Henry VII. to John Cabot and his Sons, to discover and take possession of new lands; the position is reasoned upon, as if its soundness was beyond a possibility of doubt. Henry grants to these celebrated Navigators, full power and authority to sail to all parts of the world, and “ to
 “ seek out and discover all Islands, Countries,
 “ Regions, and Provinces whatsoever, *that*
 “ *may belong to Heathens and Infidels.* He
 “ grants to them, their Heirs, and Assigns,
 “ and to every of them, licence to set up his
 “ banners and ensigns in every Village, Town,
 “ Castle, Isle, or Mainland, of them thus newly

(b) Robertson's Hist. of Amer. i. 235, 236, & note 33.

“ found ;

“ found ; and authorises them to *subdue*,
 “ *occupy, and possess*, as his *vassals and lieu-*
 “ *tenants*, all such Villages, Towns, Castles,
 “ Isles, and Mainland, so found ; procuring
 “ to him the dominion, title, and jurisdic-
 “ tion of the same.” (i) In like manner a
 patent was granted by ELIZABETH to the
 celebrated Sir Humphrey Gilbert, authorizing
 him “ to discover, find, search out, and view
 “ such remote, *heathen and barbarous* lands,
 “ countries and territories, *not actually possessed*
 “ *of any Christian prince or people* ; and he,
 “ his heirs, and assigns, are to have, hold,
 “ occupy, and enjoy the same, with all
 “ their commodities, jurisdictions, and royal-
 “ ties.” (k)—A similar grant was made in the
 succeeding reign to Harcourt and North, of
 the whole river of Amazons, provided it was
 not in the possession of *Christian* people ; (l)
 and in the instructions to Fenton by the
 Lords of the Council in 1582, he was en-
 joined not to spoil or take any thing from
Christians, without paying for it, upon pain

(i) Hackluyt, 1. 510.

(k) Hackluyt, 3. 135.

(l) Harris's Voyage, p. 1. 715. Rymer, 17. 215.

of punishment; the Infidels in these points seemed left to themselves. (*m*) Who among us but would be filled with indignation were a fleet of ships from some part of the Globe, hitherto unknown, (if such there be) to arrive in Europe on discoveries, and pretend to spoil us of our goods, or take possession of our territories upon the authority of similar patents? Such however was the law, upon which our ancestors proceeded, at the close of the fifteenth century.

But the fullest example of the Pope's authority to dispose of all earthly Crowns, is to be found in the course of the revolutions of Sicily and Naples. From the eighth to the eleventh century, that country had been a prey to the power of the Saracens, when some Norman gentlemen, under the conduct chiefly of the famous ROBERT GUISCARD, and his brother ROGER, undertook to dispossess them, which, with much valour, they effected. But though the Conquerors availed themselves of their power, and exercised the rights of Sovereignty, both in Sicily and Apulia; their

(*m*) Hackluyt, 3. 755.

possession was not supposed to be confirmed, until they had received a regular grant of it from the Pope, which they accordingly obtained from NICHOLAS II. about the year 1059. (n) It is to this grant that the supreme Sovereignty of the See of Rome over Naples and Sicily, exercised from that time to this day, and the most important matters that afterwards occurred in the histories of those countries, are in fact to be ascribed. (o) In 1130, ROGER, then only duke of SICILY, procured the erection of the duchy into a kingdom, from this all powerful Sovereign. In 1198, after many contests between different competitors, the Empress CONSTANCE, the heiress of the last family, was put in possession of it upon swearing to do homage when required. In 1207, Innocent III. married the young king Frederick to CONSTANCE of Arragon, and promised the whole realm to the family of Arragon, in case Frederick died before con-

(n) Fazell De Reb. Sic. L, 6. 389,

(o) The philosopher of modern times must smile when in the preamble to the Treaty which took place in confirmation of this grant, he observes the haughty GUISCARD styling himself, "I ROBERT, by the grace of God and *Saint Peter*, duke of Apulia, &c. &c."

summation. Upon the election of Frederic to the Empire, he forced him to agree to abdicate Sicily, in favour of his eldest son, in order to prevent the junction of the two Crowns. Upon his deposition in the council of Lyons, 1245, Innocent IV. reserved, as we have seen, the disposal of it to his absolute will; and after the death of Frederick it was annexed for ever, together with Naples, to the dominion of the Holy See in 1254. In the mean time however, Mainfroy, who had been declared Regent; trusting to his influence with the people, assumed the regal power; and it became a point of honour not to acquiesce under the pretensions of a man, who was supposed to arrogate to himself the just right of his master. In support therefore of this right, Innocent resolved to give the crown to any prince who would undertake to dispossess Mainfroy. He offered it to various potentates, and first turned his eyes on Charles Count of Anjou, brother of Saint Louis, whom he invited to take possession of it in 1252; but the absence of his brother in the East, prevented that ambitious prince from accepting the offer at that period. (p)

(p) Burigny, 2. 133.

He

He next fixed upon Richard Earl of Cornwall, brother of Henry III. who also rejected it. But though the presumptive heir of the crown thus bandied about, was his own nephew, his rejection was not founded upon any respect, either for his rights, or those of nations; but merely upon the difficulty of the enterprize he was required to undertake. His third attempt was with Henry himself, to whom he offered it for his second son, prince Edward, and by him it was accepted. Innocent dying during the transaction, his successor, Alexander IV. proceeded in it with equal zeal, and sent a ring to the prince by the Bishop of Bologna, as a mark of investiture, the ceremony of which was solemnly performed before the Court in England, "Unde," says Mat. Paris, "elevatum est cor Regis, in sublime, et exultavit tanquam, jam receptis Siculorum et Apulorum, omnium homagiis, civitatibus, et castris, in regem coronaretur. Et in propatulo, rex pater vocavit filium suum Edmondum, regem Siciliae." (q) So legitimate, in the eyes of the kings of that time, had a false spirit of

(q) Mat. Par. 911.

Christianity rendered the claims of the supposed Vicar of its Founder.

The designs of Henry however were defeated through inability. In want of every thing necessary to make a conquest, he found he had engaged in an undertaking far above his force ; and unsupported by his parliament, who set their faces against the enterprize, he offered to renounce the precious gift which the Holy Father had made him, but strange to tell, his renunciation was absolutely refused. Alexander insisted upon the execution of his engagement, and even threatened *him* also with excommunication, in case of failure. In this suspended state the affair stood for some time, when URBAN, who had succeeded Alexander, finding his hopes from England baffled, turned himself once more to France, where he invited Lewis IX. to the assistance of the church, and proposed to bestow this remarkable throne upon one of his younger children. Lewis, the most just prince of his time, hesitated at first as to the legality of the transaction, not being able to manage between two difficulties ; since he was not fully convinced of the legitimate deposition

deposition of Frederick, and therefore considered his grandson CONRADDIN as the rightful king; or, if this could be got over, he was bound to respect the claims which the investiture and the treaties of Edmund of England, had given him. In these objections however, no opposition seems to have been made to the power claimed by Councils of deposing princes, but merely to the *regularity* of that of Lyons; and it is remarkable that the delicate monarch, though he declined the offers himself, permitted his brother the Count of Anjou at last to accept them; and after some discussion with the Pope, upon the authority of the Council of Lyons, actually furnished him with powerful supplies, in the prosecution of the enterprize. The claims of prince Edmund had been soon got over, in consequence of his non-compliance with the conditions into which he had entered; and a papal letter to England, set forth in form, the power of the Pontiff to transfer the rights he had given to Edmund, to another, more able, and more willing, to perform the duty required of him. (r) The event of the affair is

(r) Rym. i. 769. Many parts of this curious letter describe at length the effects which the Supreme Pontiff

is well known, Charles was the conqueror of all his rivals, and the crown of Naples, in consequence of this gift of the Pope, continued in his family for three centuries.

The contest for Naples and Sicily, extended its effects beyond the bounds of Italy, where it was chiefly carried on, and furnished the court of Rome with another opportunity of exercising the privileges we speak of. In the wars of France and Arragon, towards the end of the thirteenth century, we again behold how the law of the European nation had been influenced by the papal usurpations, Peter, king of Arragon, had sided with the Suabian family against the Count of Anjou, and wrested from him the crown of Sicily, For this, and the difficulties which in consequence he threw in the way of the Pontiff's designs, it was resolved to proceed with him,

tiff expected to have seen in *England*, upon the injuries done to the Church. "Expectat enim, expectavit diutius, quod sublime regni Angliæ solium, cum strenua domus gentis Anglicanæ potentia, quam dictus PRÆDECESSOR in ipsius regni collatione specialiter honoraverat, apprehenderet arma et scutum, et exurgeret in adjutorium matris suæ," &c. &c.

as with Mainfroy. Accordingly he was excommunicated, his subjects, as usual, absolved; and not only Sicily, but his own kingdom of Arragon, declared forfeited to the Church, that is, to such person as could conquer it under the rights which the Church pretended to bestow.

This person was again sought for in France, and Philip III. *though not at open war with Peter*, accepted the offer for Charles, his second son. The Convention was solemn and public; a variety of conditions were set forth in detail at a full Parliament held at Paris; the Cardinal Cholet, preached a Crusade against the Arragonians; a number of persons assumed the cross; and prince Charles was declared in form, king of Arragon and Valentia, and Count of Barcelona. (s)

This offer and acceptance, gave occasion to a vigorous invasion of Arragon; the Emperor of Constantinople, Michael Paleologus, withdrew from the Spanish alliance in conse-

(s) Rym. ad an. 1283, 1284. Burign. 2. 204. Velly, 3. 403.

quence of the excommunication; (*t*) and if the family of Arragon preserved their dominion, it was owing solely to their success in the war, not from any scruples that were entertained by any prince in Europe, upon the legitimacy of the cause. Even as it was, the malediction of the Pope was considered of so much effect, that James king of Arragon, the successor of Peter, was obliged in the end to make a cession of Sicily, in order to preserve the rest of his territories; (*u*) and by the second article of the Treaty of Terrascona, which finally settled the peace between the parties, the king of Naples agreed to use all his efforts to engage Charles of Valois to renounce the rights which the Pope had given him over the crown of Arragon. Such, and so great was the force of these donations, unparalleled in the history of any country but Europe, and of any period of time but of that before us.

The course of this war also beheld another privilege claimed and constantly exercised by

(*t*) Burigny, 2. 205.

(*u*) Id. 2. 224, 225.

the Pope ; namely, that of being the sole casuist among men. We have seen that oaths, which are an invocation of the Deity, coming under the spiritual jurisdiction, were peculiarly subject to the papal influence ; and it was sufficient that an oath should be construed to be contrary to the interests of the Holy See, to make it null and void ab initio. In consequence of this, when Charles, the successor of the Count of Provence, in the kingdom of Naples, had been liberated from the prison which had been his lot during the Sicilian war ; the Pope released him from the observance of many of the conditions which were the price of his deliverance, *expressly* because they were contrary to the interests of St. Peter, and it would therefore have been impiety to perform them. (v)

We have hitherto considered the States of Europe, under the various relations in which they stood with respect to one another, and the laws which governed *their* intercourse

(v) Velly, 4. 26. The invasion of Holstein by the king of *Denmark* in 1225 was owing to a similar absolution by Pope Honorius III. (Pfeff. l. Dr. Pub. D'Allem. i. 378.)
alone,

alone, as separated by religion from the rest of the world. It is in this place however that we must also consider them, as united in a body with respect to the other quarters of the globe, and give a sketch of their manners towards nations professing a religion different from their own.

The true spirit of CHRISTIANITY, to which we have approached much nearer than our ancestors, has in the present times inclined us to observe the humane customs which we practise ourselves, towards all other nations, whether Pagans, Infidels, or Idolaters. But in the period before us, the false zeal of Christianity, or rather of a corrupted Church, induced the Western States to consider all those of a different persuasion from themselves, as a race of inferiour beings, devoted to wickedness, whom it was therefore meritorious to *invade*, and with whom it was infamous to treat.

The *Jewish* and *Mahometan* people, felt the force of these prejudices in a manner which excites our indignation at its injustice, and our pity at its cruelty. As the former composed

posed no regular State, but were merely tolerated up and down the world, it may at first appear irrelevant to take notice of them in a treatise, whose subject is the general Law of States. But though widely separated among the communities of the earth, they were all of them closely connected as one integral nation; and though they were destitute of all that forms the essence of a body politic, (as the right of dominion, of making war, Alliances, Treaties, or Conventions;) still the characteristic marks of difference which divided them from *all* other people, and the treatment which, in consequence, they endured, from *all* the Christian nations, obliges us to take notice of the conduct observed towards them, as one of the laws of Europe.

The hatred with which these people were regarded, arose evidently from the sufferings which the Founder of CHRISTIANITY had been made to endure from them; and which was thought to justify the numerous persecutions they so often underwent. So far back as the time of JUSTINIAN, it was forbidden by the Eleventh Canon of the Trullan Council,

Council, for either the Clergy or Laity, to eat any of the unleavened bread of the Jews; to enter into any familiarity with them, to receive assistance, or medicines from them in illness, or to use the same bath with them. (w) From that time forth, their persecutions through every country in Europe are conspicuous, though the particulars of them, it would take up too much time to record at large. It is sufficient to say that they were considered as the fair objects of pillage wherever they settled: They paid immense sums for the privilege of remaining under the common protection of the laws: They were farmed out to particular men for extortion: (x) In Germany they were considered as Serfs be-

(w) Howel. Synops. Can. et Concil. Œcumen. 34. The Trullanean Council was so called from its being held in the Trullum, a hall in the palace of Constantinople, which was vaulted; Trullum signifying a Dome, from Trulla a cup. Gloss. de Du Cange.

(x) HENRY III. of England sold them *for a certain number of years*, to his brother the Earl of Cornwall, in order, says Mat. Paris (902) that the Earl might tear out the entrails of those, whom the king had only *skinned*. In another place (831) he says, he raised money from them, "*non tantum abradendo, vel excoriando, sed eviscerando*," &c.

longing

longing to the domain of the Emperors: (x) In England they were also "holden as it were in "a common servitude," and this, according to Sir Thomas Smith, expressly because they had refused to acknowledge the Messiah: (y) In consequence of which also in EDWARD the First's time, the *good* Christians were not to take above *half* their substance. (z) By the laws of the Wisigoths their testimony was forbidden to be received in a court of Justice; (a) and under other constitutions they were spoken of as beasts in the language of the law, their persons and effects being adjudged to belong to the Lords of the manours, wherever they were *levant* and *couchant*. (b)

Upon the crimes of individuals among them, at one time in France, the whole body were banished, after being plundered of all they had, or put to death by the most cruel

(x) Pfeffel D. Pub. d'Allem. i. 193, 246, 400.

(y) Commonwealth of Eng. 139.

(z) Statut. de Judaismo. S. 2.

(a) L. L. Wisigoth. L. 12. Tit. 2. Art. 10. Lindenbrog. 214.

(b) Velly, 2. 336.

torments; and even while under no accusation, a commerce with their women, was ranked in the same class of crimes with a commerce with brutes, and inhibited on pain of being burned alive. (c)

We have had several other examples in the course of the present chapter, of a severity which was supposed to be legitimate, from all *Christian* to all *Infidel* nations. They would however be incomplete, were we to quit the subject, without taking notice of the celebrated CRUSADES.

I shall not fatigue the reader with any account of their rise; of the industry and en-

(c) C'est, que *souiller* avec une Juive, est un crime égal à celui qui se commit avec les betes. Velly, 2. 338. So also the *Speculum Suevicum*, Cap. 317. Si *Christianus cum Judæa*, aut *Judæus cum Christiana* rem habet, debet unius corpus corpori alterius imponi, et ita utrumque flammis consumi. For many other particulars which describe the lot of the Jews during these times. See Pfeffel. 1. 193, 246, 400. LL. *Wisigoth.* 12. 2, 3. M. Par. 431, 489, 641, 827, 831, 856. Henault, 1. 198. Velly, 4. 310, 332, 334. Villaret, 1. 239, 485. 6. 112, 118, 323. They would form a work not unimportant to the history of manners in Europe; but though not irrelevant, it would lengthen this account too much to introduce it.

thufiasm

thufiasm of the hermit Peter, or St. Bernard ; the eloquence of the Popes ; or the fervour of Monarchs ; far lefs fhall I attempt to enter regularly into their hiftory. Thefe are all too well known to need repetition, and I fhall therefore merely point out their influence with refpect to the law immediately before us.

That influence appears in its moft ftriking form, in producing at once, *a new and perpetual caufe for war*, againft the enemies of the Chriftian name, and for peace among its friends. To invade the Turks and Saracens, was not only permitted, but inculcated as a duty, although there was no *particular* grievance to be complained of ; and fuch an invafion was always efteemed not only a reafon for making peace with the party who embraced the crofs, but fubjected the perfon who began hoftilities with him, to the fevereft cenfures of the Church, and the authorifed attacks of his fellow Chriftians.

Why it fhould be thought more acceptable to God, to offer up our prayers to him in one place, rather than another ; or why it

should be an indispensable duty with several millions of men in one quarter of the globe, to march to the attack of several millions in another quarter, for the possession of a certain Sepulchre and Cross, (however venerable they might be rendered by him of whose sufferings they were the memorials;) it will be difficult to explain upon any solid, or philosophical principles. Such however was the opinion of our Ancestors. It entered into all their operation, influenced the whole cast of their minds; and to make war upon Infidels, as has been observed, was a very conspicuous part of their Law of Nations.

In no country did this discover itself with greater force than in *Spain*, for it was not to the East, that it was solely confined. The whole of this fertile peninsula exhibits for a long time, but one great division of the states which composed it into Christians and Saracens, or Moors. Their wars were perpetual during the whole of the period before us; the ground was disputed inch by inch; and the CRUSADE, with all the well known advantages of remission of sins to those who undertook it, might almost be said to be a
standing

standing one. In consequence of this the *Christian* nations there planted, received not unfrequently, a powerful aid from their brethren in other parts of Europe; and in 1148, they saw a numerous fleet of *Germans, Flemings, and English*, sail up the Tagus to assist the new king of *Portugal* in the conquest of Lisbon. The change of his capital from *Conimbro* to that City, was the fruit of it. (*d*) It was in Spain also that the celebrated founder of the DOUGLASSES perished in the course, as he thought, of his duty, (*e*) after having just executed the last and pious command of his friend and Sovereign, itself a strong indication of the spirit we are commemorating. (*f*)

The most eminent examples however of that spirit are afforded by the Monarchs of *Germany, and France*, in the citations which

(*d*) Henault, 1. 191. Mod. Un. Hist. 18. 184, 191.

(*e*) Buchanan, L. 8. c. 58. Nihil interesse ratus, quo in loco, rem Christianam servaret, se cum Hispanis jungit, &c.

(*f*) ROBERT BRUCE had undertaken a Crusade, but being too old to perform his vow, he requested Douglass to carry his heart to Jerusalem, and bury it there.

they sent to the Sovereigns of the *Saracenic* name. In the summons of the Emperor *FREDERICK* to *SALADIN*, previous to the second Crusade ; he speaks to him as follows ; “ Since
 “ you have lately chosen to prophane the
 “ Holy Land, which, under the king of
 “ Heaven, belongs to us ; we think it part
 “ of our care and duty, to punish such pre-
 “ sumptuous and criminal audacity ; and
 “ therefore, unless you restore the whole of
 “ your conquests, and make satisfaction for
 “ the injuries done to the Christian Church,
 “ within the space of a year, we mean to
 “ prove the fortune of our arms with you *in*
 “ *virtue of the wonderful Cross, and of the true*
 “ *Joseph.*” (g) The answer of *SALADIN*, was
 couched in terms of dignity and good sense.
 He claimed, he said, the dominions he pos-
 sessed, by rights, acknowledged by the cus-
 toms of the world ; nor could he conceive
 how the circumstance of their religion could
 give the Christians any title to them ; he
 observed that the Saracen Host, was fully
 equal, and even superiour, to the Christian ;
 that princes, equally powerful, and equally

(g) Mat. Par. 164.

remote, could arm in defence of their name and religion ; that so far from fearing the extermination with which he was threatened, he would gladly go to meet the Emperor, at the head of all his power ; yet, as he had no objection to peace, so little did he conceive Religion to be a cause for perpetual enmity, that if the Christians would give up the only three cities left them among the Saracens, *Tyre, Antioch, and Tripoli*, he would restore to them their CROSS, deliver up his captives, permit a priest to reside at the temple, and shew favour to their pilgrims. (*b*)

The preliminaries to the Crusade, undertaken by St. Lewis sixty years afterwards, were conducted pretty much in the same manner. The king, on his arrival in Egypt, summoned the Soldan to render that homage to the Cross, which was due to it, he said, *from all the world*. In case of refusal, he

(*b*) Mat. Par. 164. It is curious to observe how the practice of both the religions had wandered from the principle. The Mahometan, who was ordered by his Prophet to disseminate his by fire and sword, was preaching peace : The Christian, who, if he had acted up to his Saviour's doctrine, should have molested no one, breathed nothing but war.

bade him prepare for absolute destruction from the hands of men who feared nothing *while extending the Empire of Christ*. The Soldan, who was at that time nearly consumed by a mortification of the body, which soon after caused his death, is said to have shed tears at this injustice. He replied however with spirit, that no one had ever attacked Egypt with impunity, and that those who thus *wantonly* invaded him, would soon be made to feel the temerity of their enterprises. (i)

The whole Christian race might have profited by these answers of the Mussulmen they affected to despise. They were however only the more inclined to those bloody invasions, in which the kings of Europe, and of Asia, distinguished themselves so much for the most dazzling valour, and the most horrid cruelties, at the same time,

As the difference of the religions produced a particular cause for war, unknown to either set of nations among themselves; so also when war was begun, it was the reason why

(i) Joinville. Vie de St. L. 1249.

it was conducted with a barbarity peculiar to itself. "In the name of the God you worship," said SALADIN, to the prince of ANTIOCH his prisoner, worn down and emaciated with hunger, and chains; "what would he command you to do with me, if I were in your power, as you are in mine?" "He would counsel me," returned the fearless prince, "to have you beheaded on the spot; but as you are a *Sovereign*, like myself, though an infidel; I myself ought to be your executioner." "Your own mouth has pronounced your doom," said the Saracen, drawing forth his sword, and the prince who had thus courted his fate, is said to have kneeled down joyfully to receive the blow. The last words also which he uttered, evinced the firmness of his enthusiasm: "Here dog," said he, "take this head of mine, which is rough, and squalid, with hair, and famine; little good can it do thee, and nothing more canst thou now have; my soul I commend to my God." (k) In reading the records of such actions, we know not whether our admiration is most commanded by the splendour

(k) Mat. Par. 813.

of mind which they discover; or our regret excited, at the prejudices and barbarity which obscured them.

To these prejudices must be attributed the fate of the brave and pious *Pieul de Ragonet*, who was sawed in halves, two centuries afterwards, by another Sultan of Syria, for daring to blame the *Mahometan* faith, and refusing to renounce his own (1). To these must also be attributed an action on the part of RICHARD I. the bare recital of which, fills us with horror. In 1191, upon the taking of Ptolemais, the Saracen prisoners were to be delivered up by capitulation, for a certain ransom to be paid at different periods. Some distrust being evinced by SALADIN in the course of the affair, RICHARD, who here but little deserved his surname, ordered out five thousand captives at once, who were led, bound, and naked, into a large plain; in which defenceless state, they were all deliberately massacred, by those very soldiers, whose honourable gallantry in open battle, has so often been the theme for poetry

(1) Chron. de Montrelet. v. 2. an. 1425.

and praise. (*m*) That the vengeance might be still more complete, the bodies of these unfortunate victims were instantly cut open, their galls torn out for the purposes of *médécin*; and so great was the ignorance and blindness with respect to Mahometans, that much gold and silver were supposed to be found in their inside. (*n*) In the midst of this cruelty, however, the interests of his religion, though he mistook them, were so far consulted by Richard, that those Mussulmen who consented to be baptized were allowed their lives. (*o*) It is not incurious to observe the conduct of the same men, in other matters, during this remarkable affair. When the Cross, the sacred object of their perilous warfare, was delivered to them by SALADIN, they bowed down in silence before it; they prostrated themselves in humble adoration, and covered their heads with the dust; and when *Ptolemais* itself was delivered to them, their first

(*m*) Iter. Ric. Hieros. C. 4. ap. Gale, Hovedon. 697.

(*n*) Iter. Ric. Hierosol. C. 4. ap. Gale et Hovedon. 698.

It is the latter that asserts "Quos omnes evisceraverunt, et aurum et argentum multum invenerunt in visceribus eorum, et fel eorum usui medicinali servaverunt."

(*o*) Hovedon. 696,

care

care was to purify the Mosques, which the infamous worship of *Mahometans*, it was supposed, had defiled. (p) On the other side, the Saracens were not behind with them in zeal; and when *Jerusalem* was recovered by Saladin, the Temple, which the Christians in their turn were supposed to have defiled, was purified with equal care, and washed with rose-water, in order to efface the stains of their impious worship. (q)

It has been observed that their Religion itself prescribed the death of *Christians* as a duty to the followers of MAHOMET, and Saladin knew well how to take his advantage of this. The war he waged therefore against the Europeans, was considered, not only as a defensive, but a sacred war, equally supposed to spring from the commands of God; and the *Imans*, imitating the arts of the Christian priests, like them, promised to their soldiers the remission of sins, and the palm of martyr-

(p) Vie de Salad. par Marin. 2. 299, 305.

(q) Aqua rosea tamquam a Christianis sordibus expians sacrilegis ritibus, &c.

Chron. Walt. Hem. C. 34. ap. Gale.

dom. (s) The opposing armies therefore every where met with the most inflamed and exterminating hatred; the Mussulmen took the title of *Unitarians*; and the Christians, in conformity with the mystery of their worship, were called *Trinitarians*. (t)

In the infancy indeed of Mahometanism, all the enemies of that religion were put to death without mercy. But after its establishment, whenever the Mahometans declared war against a people of a different faith, they gave them their choice either to embrace their religion; or to submit and pay tribute; or take the consequences of battle. In the first case they were incorporated among the Mussulmen: in the second, they were allowed to profess their own tenets, provided they were not idolatrous: in the last, if they were conquered, the women and children were reduced to slavery; and the men, if they persisted in rejecting the faith, were either slain, or disposed of at the pleasure of the prince. (u)

(s) Mod. Un. Hist. 1. 248.

(t) Marin. 2. 184, 185.

(u) Mod. Un. Hist. 1. 248.

In pursuance of this spirit, when Chatillon, a famous Crusader of those times, was taken prisoner by SALADIN, he was reproached, amongst other things, with blasphemy against *Mahomet*, and sacrilege, for having attacked the holy cities of *Mecca* and *Medina*; notwithstanding which, his life was offered him, if he would renounce his religion. This being refused, "It is time," said the Sultan, "to punish such accumulated crimes; I have sworn that thou shalt die by my hand, and I will now fulfil my oath." Upon this he immediately seized him; and, dragging him into the midst of the assembly, condescended, for the second time, to become the executioner of a *Christian* Sovereign. (x)

It is really wonderful to consider, how long this remarkable rage for destroying a whole class of nations, on account of their religion, continued amongst us. *Jerusalem* once conquered, it became, according to the Church, the duty of every Christian to defend it; although, politically, no wise concerned in its fate. A resolution to make war upon the

(x) Marin. 2. 22.

Turks, was the chief expiation for the greatest crimes: it was the principal condition of the peace between the Emperor Frederick, and Gregory IX. the instrument of pardon to our Henry II. for the murder of Becket; (y) and the means of cure, as it was supposed, to Lewis IX. in a dangerous sickness. (z) To such also as had distinguished themselves this way, a crown was supposed to be a fair reward; and this sort of merit forms the ground of the erection of Sicily into a kingdom, in favour of Roger III. He is styled in the grant, "*Inimicorum Christiani nominis, Intrepidus Extirpator*"; for which, and the great services of his ancestor, *Robert Guiscard*, in the same cause, he was received by the Pope among the crowned heads of Europe, in 1139. (a)

In the thirteenth century, this spirit displayed itself in a manner which gave rise to an expedition that was new to the world. Little improved by the experience of the past, not only men, but *children*, resolved upon the

(y) Lyttelt. 3. 97.

(z) Joinville.

(a) Collect. reg. Concil. 98.

deliverance of the sacred Cross. Fifty thousand of the latter, composed of either sex, set forth for Asia, from Germany and France, led on by priests, who themselves knew no better than the army they commanded. The event was such as may be supposed; the whole of the expedition failed, and mostly before it could reach the destined theatre of operations. Many of them were attacked by the *Lombards*, and fell an easy prey; many of them suffered shipwreck; and not a few were sold to slavery, by the very merchants with whom they had contracted for their passage. "What," says a judicious historian, "are we to think of the parents of these deluded creatures, for not preventing so extravagant an enterprise; or what, of those governments which could suffer the best hopes of the State to run thus blindly to their destruction? (b)

A hundred years afterwards, the same spirit discovered itself in *France*, in a manner not very dissimilar from the last, in the projected Crusade of the fanatics, called, from their original occupations, the *Pastoureaux*. Though

(b) Velly. 2. 458.

these expeditions had for some time been laid aside, the king, PHILIP V. was seized with the sacred fury; and, in the year 1317, we find him gravely asserting, *that Christ had left the Holy Land as an inheritance to his followers.* (c) Being, however, persuaded from his purpose of a Crusade, on account of the weak state of Christendom, a number of shepherds and country labourers conceived the chimerical idea that it was reserved for them to be the deliverers of the holy land. They therefore abandoned their flocks, and, imagining that what God had designed, he would bring about in his own way, they thought it unnecessary to supply themselves with other arms than the pilgrim's scrip, or other provisions than what they obtained by begging. The zeal of the people, where they passed, amply supplied this latter want; their numbers increased; women abandoned their families to join them; and the king himself was supposed to favour their undertaking. Falling, however, into disorders, under some designing leaders, they degenerated into robbers, (as more regular Crusaders had

(c) Adjourn. par Philippe V. contre Rob. Comt. de Fland. Leibnitz. Cod. Dip. 95.

often done before) and were suppressed at last by the civil magistrate. (d) From that time, the vigour and genius of these expeditions seem to have been worn out in the world; and though many were planned, yet none of any consequence were afterwards undertaken. The law upon the subject, however, still remained the same; and the mere circumstance of religion, or the recovery of *Jerusalem*, was a sufficient cause for war against the Infidels. One Sovereign State remained, and remains to this day, the professed object of whose institution, is to wage perpetual war with them; an object which the knights of *Malta* have always pursued with great gallantry and perseverance. Occasionally also, through most of the centuries afterwards, we find this antient spirit breaking forth. JOHN II. of France, famous for his bravery, his honour, and misfortunes, planned a Crusade upon his return from captivity, and, in 1362, went for that purpose to Avignon, where, under the auspices of the Pope, he conferred upon the matter with Peter de Lusignan king of Cyprus, and Waldemar III. king of Denmark, two monarchs, the proxi-

(d) Velly. 4. 329.

mity of whose territories at least, could have had no part in the concert with which they acted. These three princes resolved upon the invasion of the East, as usual, for the deliverance of the Christians from the Saracen tyranny; and, as usual, nothing arose from it but the severer persecution of those sufferers in whose cause they had armed. (e.) There were two reasons, however, says the historian, which inclined the king of France to the undertaking; one, in order to fulfil the vow of his father, PHILIP of VALOIS; the other, to disgorge his kingdom of the famous banditti, known by the name of the Companies. (f) This last is of the same kind with that which inclined many sovereigns to undertake the Crusades at first; so that, in this respect, the Law of Nations became subservient to the law of politics; and whenever the warlike spirit of the people proved dangerous to the sovereign, the received customs of the times pointed out a *legal banishment* for them into Palestine.

The lapse of a century did not wear out these manners. The intentions of our

(e) Froissart. v. i.

(f) Id. Ib.

HENRY IV. previous to his death, are well known; and in 1458 PIOUS II. endeavoured to revive the true spirit of the Holy War. He invited all the princes of *Chriftendom* to a general assembly at *Mantua*, to deliberate upon the invasion of the East. Europe, however, was little able to defend herself; and the Turk had by that time fixed his standard firmly within her precincts, by the total destruction of the empire of *Constantinople*; exclusive of which, the whole body of her kings were in arms against one another. They nevertheless sent their ambassadors to the Assembly, and as no one had yet thought of calling in question the extravagance and injustice of these causes for war, it was their weakness alone which prevented the expedition. (g) In 1475, CHARLES the BOLD laments that the perjuries and attempts of LEWIS XI. prevented his design of turning his arms against the Turks. (b) In 1480, LEWIS himself, whether through policy, or real zeal, pretends to the same design; nor can we forget, while on the subject, the pious humility of a lady, hardly less than sovereign in England, in the person of Margaret Coun-

(g) Hist. Ecclesiast. Villaret. 4. 338.

(b) Garnier. Hist. de Fr. I. 333.

tefs of Richmond, the mother of HENRY VII. who is faid to have been in the habit of obferving, that upon condition that the peers of *Chriftendom* would combine themfelves againft the common enemy, the *Turks*, ſhe would moft willingly attend them, and be their laundrefs in the camp. (*i*)

At the clofe of the fifteenth century, the ardent, but ill-directed ſpirit of Charles VIII. brooded perpetually upon theſe chimerical expeditions, which from his youth had flattered his imagination; he even purchaſed, at a large price, the rights of Andrew Paleologus, the heir of the Chriſtian emperors to the throne of *Conſtantinople*; (*k*) and the authors in general agree, that his adventurous invaſion of *Naples* was made as the firſt ſtep towards the conqueſt of the Eaſt. (*l*)

The continued ſucceſſes of the *Turks*, however, changed, by degrees, this part of the European law of nations; and the monarchs of Chriſtendom found, at laſt, not only the vanity of theſe enterpriſes, but the folly of

(*i*) Camden's Remains. 272.

(*k*) Vide infra. chap. xv.

(*l*) Guicciard. ad. an. 1492.

their cause. The holy sepulchre was so far removed from them, by the extension of the Ottoman dominion, almost into proper Germany, that they lost sight of that famous point of contention, and began to consider the Infidels merely as a political power. Still, however, the marked distinction created by religion, remained at least as far as the time of Grotius; that father of the Law of Nations having handed the position to posterity, that to defend a Christian state against the attacks of Infidels, is yet the duty of every Christian community. (*m*)

I cannot quit the point of the Crusades, and by that means close the subject of this chapter, without calling to the reader's recollection, that although they took their rise from hatred to Infidels, and the wish to recover Jerusalem, yet they were by no means confined to the Infidels in the East, or to Infidels alone. All Pagans, whether in Asia or in Europe, were attacked by those who assumed the cross. The conversion of *Prussia* was finally effected by it under the Teutonic Knights; (*n*)

(*m*) De Jur. B. et P. 2. 15. 12.

(*n*) Puffend. Introd. à l'hist. T. 5.

and

and even a slight shade of difference from the received topics of Christianity, or rather from the liturgy of Rome, became, at last, a legitimate cause for war.

This was the only thing wanting to the ambition of the Popes; and, under their able hands, it was turned into a very powerful engine, by which to crush all sorts of heresies; all princes who shewed a disposition to disobey him; and, in fine, all the enemies of Rome, under whatsoever shape they assumed. These, it was supposed, were equally hateful to Christ, with the Pagans and Turks; and when the holy Father thought them of consequence enough to combat them by means more terrible even than excommunication; he detached his Legates all through *Christendom*, to excite its various princes to arms, in the same manner as when he meditated the invasion of the East. Those who obeyed also, were supposed to be equally meritorious with the others; they were equally soldiers of Christ; they wore the same badge of the cross; and they were alike entitled to the remission of sins,

In this manner it was that the See of Rome became so terrible to a vast number of princes who attempted to set it at defiance: To the immense sect of the *Albigenses*, and the puissant Count of *Tholouse*, in the beginning of the thirteenth century; (o) to Frederic II. (p) whose deposition in the Council of Lyons we have related at large; to his son CONRAD in 1251, the invasion of whom was to confer even greater spiritual advantages than a pilgrimage to the Holy Land; (q) to MAINFROY, when vows against the Saracens were commuted for an attack upon the Sicilian; (r) and finally, to all who did not acknowledge the election of Pope Urban, in 1383, when a Crusade was preached in England, (s) and Spencer, Bishop of Norwich, its Generalissimo, achieved, in

(o) For an able summary of the historians on the heresy of the Albigenses, and their consequent destruction by a Crusade, see Velly. 2. 203 to 222.

(p) Mat. Par. 767.

(q) Statuens retributionem mirabilem, scilicet omnium peccatorum remissionem *ampliolem quam pro peregrinatione in terram sanctam facienda*. M. Par. 827.

(r) Hist. de Sicile. 2. 123. 148.

(s) Rymer. 4. an. 1383.

con-

consequence, the conquest of Maritime Flanders. (†)

Such, upon the whole, are the chief points of the influence upon the Law of Nations in Europe, which, as far as I have been able to discover, arose, during these ages, from the profession of CHRISTIANITY. They form an immense mass of materials, which it has been somewhat difficult to arrange; and I have therefore often incurred the danger of repetition, and certainly of prolixity, in their elucidation. The view, however, which was taken of the subject, demanded exactness, and above all, what are called Proofs and Illustrations. Those which have been adduced, I have thought sufficient to support the points of the theory; and were they not so, materials are afforded in such plenty, by the history of every country in Europe, that I have always been more embarrassed in determining what to reject, than in selecting what to record. It must be confessed, that the matters which have here been presented, are a proof that Christianity, *in its corruptions*, was often, during these times, as injurious to the law in

(†) Froiss. v. 2. chs. 132, 133, 134, &c.

question, as it certainly has been beneficial *in its purity*. It must be recollected, however, that the very point is the intimate connection *which all religion whatsoever*, whether corrupted or pure, whether true or false, will ever have with the laws, public as well as municipal, of all the nations that profess it; and I have therefore been obliged to pursue it, in the religion before us, through all its effects, however adverse, or however favourable.

C H A P. XIV.

OF THE INFLUENCE OF CHIVALRY.

A Very interesting theme presents itself now to our enquiries, in the institutions of CHIVALRY; which have often before been the subject of criticism, but, as usual, more by way of definition, and description, than to point out their effect upon the laws of the world. It was the lot of these ages, upon principles not unnatural, to be witnesses to the greatest inconsistencies at the same time; for at the same time, the most horrid and barbarous injustice, and the most heroic and disinterested acts of generosity, are for ever arresting our attention. The little progress which the *European* people had made in morality, the savage manners of those they sprang from, and the laxity of the various governments, gave loose, as we have seen, to the indulgence of every sort of passion. Above all, the universal independence of the Barons, under the feudal system, took away all restraint from those who were at once strong and willing enough to invade the peace of mankind,

kind. A man of brutal manners, and narrowness of soul, who dwelt within the walls of a fortress, whence he could sallie forth at pleasure to the annoyance of his neighbours, and which afforded him a retreat from superiour force, or a secure deposit for his plunder, had every temptation to play the tyrant and the robber. Sovereigns and magistrates had long attempted in vain to repress these mischiefs; religion, as we have seen, had interfered, but with doubtful success; and, in this emergency, the world turned itself to every means it could invent for the promotion of its improvement. It fell upon one, which, in such rude times, it must be owned, was an extraordinary, but perhaps the most effectual mode of restraining what had so long baffled more regular attempts.

There is probably nothing more curious to philosophical investigation, than that disposition of men, which has often been evinced, to place all their interest and ambition either in acquiring, or in abstaining from, some one particular thing the possession, or the loss of which, does not seem, in the abstract, to be worth so much pains as are bestowed upon it. When this is the case, it generally goes by the name

name of the POINT OF HONOUR; and though it shall be sometimes an object to which we are not personally or naturally called, yet whenever it is once established, the whole bent of our minds, and the force of our virtue, are collected into it, as into a focus. Indeed the history of humanity has often made us observe, that whenever, through the superiour temptation to do ill, an absolute excess of degeneracy, or mere accident, the world has been plunged into extraordinary difficulties, it has generally betaken itself to as extraordinary means for its recovery. Hence the opposite virtues and vices are commonly found to be coeval; the extremes of good and evil are discoverable in the same period; and it is only when things pursue a regular and tranquil course, that a wise moderation can exist.

The miserable state of society during these ages, and the atrocities that were daily committed, produced a POINT OF HONOUR such as we have been noticing. Men saw the necessity for reformation; the common modes had been tried in vain; and it was necessary to kindle *enthusiasm*, to effect a cure. By working therefore, though in a different way, upon

the same warlike passions which caused the mischief, and raising the fervour of the mind, through every motive of religious devotion, and every worldly prejudice ; Europe at length raised within itself a spirit the very opposite to that of which it complained. Accordingly, if men were found, on the one hand, who gave way perpetually to their avarice, revenge, ambition, or lust ; there were numbers, on the other, who placed their *point of honour* not only in abstaining personally from these, but in opposing and exterminating all those who did not.

It was hence that the laws of CHIVALRY arose ; which have so often excited our interest in the numerous legends, and our admiration in the bold flights of poetry to which they gave birth.

I shall leave the regular account of the particulars of this remarkable Institution to those who have made it the immediate subject of many a learned and pleasing disquisition ; (a)

(a) See Dissertations de Du Cange sur Joinville. Du Tillet Recueil des Rois de Fr. Mem. sur la Chevalerie par M. de Sainte Palaye. Favine Theatre d'Honneur. & Dissert. Hist. sur la Cheval. par Honoré de St. Marie.

and

and, as usual, supposing them well known, shall merely examine them as they arise, according as they appeared to have influence on the law of nations. Such influence, as may be supposed, (considering the military spirit of the Institution) may be traced in more direct and regular steps than any other ; and, indeed, as long as it lasted, it will be found to have been the cause of considerable improvements in the mode of carrying on war.

Exclusive of courage equal to heroic ; of patience under hardship ; of perseverance in the achievement of the most adventurous undertakings ; which all tended to the advantage of the knight himself ; it is well known, that he was expected to be accomplished in all the gentler and more humane virtues of honour, courtesy, fidelity to his word, and kindness to the vanquished ; qualities, which tended to the advantage of all other men. In the practice of these, he was educated with care from the age of seven ; he passed through the different gradations of Page and Esquire, (this last again divided into various degrees) before he could attain to the summit of his dignity. Nor was the last honour conferred, till he had

employed many hours in devotion, in which he fervently craved the assistance of the Deity, to fulfil the generous objects of his profession.

The court and castle of every sovereign and greater baron in Europe, was filled with the best hopes of its youth, who were thus preparing themselves for the great tasks they had undertaken; a custom, besides, which enlarged the means of education, and supplied the want of power, or want of attention in parents to points so necessary for the improvement of the world. Hence, when the knight, thus formed, sallied forth to support his part among men, the education he had received naturally taught them to expect a greater exertion of duty from him than from others; and any failure in these points was therefore more severely punished. (b) These circumstances alone, it should seem, ensured the production and support of a vast body of the military all over the world; whose duty was to soften the horrors, as well as to shine amidst the dangers, of war.

(b) Villaret i. 300.

The smallest attention to the annals of the ages we treat of, will point out innumerable proofs of this; and whatever savageness of temper a man might naturally have possessed, the POINT OF HONOUR, and spirit of knight-hood, had the most palpable and beneficial influence in generating a continual antidote to its consequences. So early as the middle of the tenth century, when the Emperor HENRY I. introduced tournaments into Germany, (which it is well known were the fairest graces of *Chivalry*) it was ordained that no one should be admitted to that most honourable of all amusements who did not profess CHRISTIANITY, or who had been known to have been guilty of perjury, treason, *slaughter in cool blood*, sacrilege, or violation of women. (c) Certain it is, that from about this and the next century (to which the full birth of Chivalry is generally ascribed) we are able, notwithstanding the barbarities that have been related, to discover, nearly all over Europe, a change of manners which was evidently forced, because other improvements did not keep pace with them, and which may fairly be attributed to a chivalrous origin. In a romance, called

(c) Heiss. i. 54.

the WINGS, near five hundred years old, and quoted by M. de Sainte Palaye, (*d*) the author allegorically supposes the valour of CHIVALRY to be borne up by two wings; without which, he says, it can never take a lofty or extensive flight. One of them is called *Liberality*, the other *Courtesy*. Of this latter, he observes, it arises from Chivalry, as from a fountain; that it comes from God; and that the knights, over whom it flows from head to foot, are its exclusive possessors; they have the *fee simple* of all that it waters; the rest of the world have nothing but the outside.

To justify this allegory, we find a variety of cases all through Christendom, many of which we shall have occasion to advert to in the discussion of other points. The annals of our own country are full of them; nor can we help remarking the sudden progress of mankind to generosity, from savageness and ignorance, in the conduct of William Rufus towards many of his enemies, and of the earl of Gloucester towards the captive Stephen. The former of these princes, in his politics and general character, possessed all the barbarity of

(*d*) Mem. sur la Cheval. i. 78.

the times. As a knight, however, he was equal to the most courteous. Being overthrown in a combat at the siege of Mount St. Michael, and only escaping by making himself known, he demanded sternly the name of him who had caused this disgrace, and the soldier not fearing to declare it, "by Luke's face," said the king, "thou shalt be my knight, and be enrolled in my checke with a fee answerable to thy worth." (e) At another time, having taken one of the enemy's generals prisoner, and rather deriding him for want of skill, the general answered, that if he was once again at liberty, the king should find he was not a man to be laughed at: upon which, "well liking the confidence of his spirit," says Speed, he replied, "Well then I give thee full liberty; go thy ways; do what in thee lieth; I am the man that ever will mate thee." (f)

The fatal battle of Lincoln having reduced Stephen king of England to captivity, under the power of the earl of Gloucester, that accomplished nobleman, though the struggle had been for no less than a crown, which in for-

(e) Speed, 439.

(f) Id. 440.

mer times would have instantly decided the fate of a rival when prisoner, treated him with the greatest humanity, forbade all persons to reproach or insult him, paid him the respect due to his dignity and royal blood, and kept him in safe but *gentle* confinement. (g) STEPHEN himself had also shewn a great example of courtesy and good faith, under the strongest temptations, when he suffered the Empress MATILDA, whom he might have taken in Arundel castle, to pass in safety to Bristol, giving her the earl of Millent as an escort and protector, an office, adds William of Malmesbury, which no true knight could ever decline, *even towards his greatest enemy.* (h)

The same good principles which dictated to a knight the humane treatment of a vanquished enemy, forbade him still more to attack one that was unarmed. In older times, *all* ranks of men had been confounded in one indiscriminate massacre, or reduced to a servi-

(g) Lyttelt. 1. 207.

(h) Will. of Malms. 2. 184. Quem cuilibet, quamvis infestissimo inimico negare, laudabilem militum mos non est.

tude that was general ; but it was beneath a knight to attack mere labourers of the foil, or mechanics who could do no mischief ; and such were the representations of Beaumanoir, a Breton, to Richard Bembrow, an English officer, in 1350, who was ravaging the country. He told him that so valiant a knight ought not to act so contrary to the laws of war, and that if he really wished to deserve his title, he would attack men only *who had arms in their hands.* (i) These representations produced a challenge, and ended in the celebrated combat of Thirty, related with much exactness by the historian of Bretagne ; in which thirty French, and thirty English knights, fought till the latter were all killed or disabled.

The most beautiful examples, however, of the courtesy to enemies which was produced by CHIVALRY, are to be found in the actions of EDWARD III. and of his gallant son, who were the delight and flower of knighthood ; particularly in the conduct of the former to Ribbemont, a French nobleman whom he

(i) See D'Argentrée's Hist. of Bretagne, an. 1350.

had overthrown in combat ; and of the latter towards John king of France, after the battle of Poitiers : both of them are too well known to need repetition here. (k) The whole life, almost of the Black Prince, was passed in acts of bravery or courtesy. None are more characteristic than that which gave liberty to the celebrated BERTRAND DU GUESCELIN, the most renowned knight of his time. This general being made prisoner at the battle of Navaret, which restored Peter the Cruel to the throne of Castile, was confined in the castle of Bordeaux, where the council of the prince not unwisely determined to detain him. Generosity of soul, however, and a jealousy which sprang from the very spirit of CHIVALRY, undid in a moment what policy had deliberately determined. Albret, an officer of the prince's, coming to him one day, asked him if he would be offended if he informed him of a report that was spread concerning him. Edward telling him that he would even consider it as a mark of his affection, Albret replied, " It is said of your high-

(k) Froiss. v. i. chs. 151, 152, 168. See also the treatment of Sir Adam Gordon, by Ed. I. who had personally engaged him. M. Par. 1002.

“ nefs, that you refuse to ransom BERTRAND
 “ DU GUESCELIN, as you have done your
 “ other prisoners, because you are jealous of
 “ his valour, and are even afraid of him.”
 “ I afraid of him !” returned the prince, with
 emotion, “ I am afraid of no one on earth ;”
 and immediately ordered him to be admitted
 to ransom. (1) The settlement of this ran-
 som also will give us a very good picture of
 the manners of the times. BERTRAND begged
 the prince to consider that he was a poor
 knight, who had nothing but what he had
 gained in the war ; and the prince therefore
 told him to name the sum himself. “ If I
 “ must do so,” says this accomplished gentle-
 man, “ I will at least name something worthy
 “ a man who has had the honour to command
 “ the king’s armies ;” and he named 100,000
 gold florins. Edward refused so large a sum ;
 upon which Bertrand fixed upon seventy thou-
 sand, and added *he would not abate a farthing*.
 This was agreed upon ; liberty was given to
 the Frenchman to go where he would, in
 search of the money, *upon his parole* ; and so

(1) The story is told at much length, and with great
 simplicity, in Froissart. v. i. ch. 244. Vie de Bert. du
 Guesc. p. 137.

great was the esteem for him even among his enemies, that CHANDOS, the most redoubtable of them, offered him his purse on this occasion, and the princess of Wales herself made him a present of 30,000 florins towards the sum. (m) Nothing can be a greater proof of the improvement of manners, and the influence of *Chivalry*, than the whole affair.

The Lord Chandos, above-mentioned, was the most accomplished of the English knights; and though more than once a determined enemy of Bertrand in the field, yet on other occasions he had treated him with remarkable courtesy. On his combat with THOMAS of CANTERBURY, formerly mentioned, (n) he offered him his own arms, and the best of his horses, for the battle, though against one of his own party, which were thankfully accepted; (o) and at the battle of Auray, (in the quarrel for Brittany) when Bertrand was surrounded by the English soldiers, he broke through the press, and commanded them to

(m) Id. Ib.

(n) Chap IX.

(o) Vie de Bert. du Guefc. 33.

save his life. (p) When this general was himself mortally wounded, some years afterwards, his brother having ordered the deaths of all his prisoners, in revenge, he prevented the execution, saying they had but done their duty, and that his death ought not to prevent him from doing justice to their valour. (q)

In this last battle also it was the courtesy of CHIVALRY which saved the life of *Carlouet*, the French commander. There was among the English, says the author, a knight, who having been formerly the prisoner of *Carlouet*, was rated at so high a ransom, that he was totally ruined, and ever after regarded him with mortal hatred. In the heat of action, *Carlouet* fell into the hands of five or six soldiers, who were going to put him to death; but the knight, breaking through them, rescued him from their hands, and called out to him, "I have too much honour, in the condition to which you are reduced, to remember the ill treatment I experienced from you; I might, without shame, revenge myself, by taking away your life; but I

(p) Id. 79.

(q) Id. 201.

" give

"give it you; and though I make you prisoner in my turn, I promise you more kindness and easier terms than I was made to feel when in your possession. (r.)" Such traits of nobleness make us forget all the extravagances with which the Institution that gave them birth was certainly obscured.

The French, as it may be supposed, were not behind-hand in courtesy; and a circumstance in the fourteenth century, though trivial in itself, is particularly demonstrative of the change which manners had undergone. Although the kings of France and England were such constant, and often such personal enemies, it had been the custom for the former, to make a present to the latter, of the best wines of France for his table. In 1369, CHARLES V. thought it right to continue this custom, *notwithstanding a rupture between the crowns.* (s.) In 1475, at the conferences of Picquigny, though EDWARD IV. was in arms at the moment against LEWIS XI. he was supplied in his camp with every thing he wanted, from the king's household, even to

(r) Id. Ib.

(s) Villaret i. 393.

torches and candles. (t) A more serious mark of confidence and generosity had been shewn by PHILIP V. to EDWARD II. in 1319, when in the safe conduct granted to the latter to come into France, all those whom it concerned were commanded to believe him, and let him pass as king of England, *upon his bare affirmation.* (v) In the next century, the TALBOTS, and the XANTRAILLES, of the time, in some measure revived the courtesy of Chivalry, which the hatred of perpetual war had almost extinguished. Talbot was taken at the battle of Patai by Xantrailles, who presenting him to the king, demanded leave to give him liberty without ransom, which was granted. In the course of that eventful war, Talbot had a full opportunity of returning this courtesy, by becoming in his turn the conqueror and the liberator of Xantrailles. (w)

The effect of this courtesy of knighthood upon men's conduct in war, is also exemplified by the rules observed in fixing the quan-

(t) Phil. de Commines. L. 4. Ch. 6.

(v) Et lui dix Roys d'Angleterre soit de tous ce creux, par sa simple assertion. Rym. 3. 825.

(w) Villaret 3. 416.

tum of ransom. MONTLUC, a famous knight about the middle of the sixteenth century, when the true spirit of Chivalry had been revived in the world, observes in his commentaries, that he was always *moderate* in this point towards his prisoners. "Cela est indigne," says he, "de les escorcher jusqu'aux os, quand ce sont personnes d'honneur qui portent les armes." (x)

A man, writing in these times, cannot but advert to the sad change which the manners and maxims of war of this once generous people have almost in a moment undergone. Some future investigator of our subject will possibly in other centuries have it to remark, that at the close of the eighteenth century, when the Convention of France had boasted that it had got the start of the rest of Europe by 2000 years in refinement and knowledge, it passed a decree by which every English and Hanoverian prisoner should be put to death. The most horrid of the barbarities related in the first section of this chapter, are thus made to revive, and to be the proofs of 2000 years superiour progress in improvement. The fu-

(x) Montluc ap St. Palaye, i. 364.

ture philosopher will also have to observe upon the generous and dignified return that was made to that decree, and the manner in which the return was received ; and if any thing will make him suppose that the wicked folly and injustice which governed the intercourse of the Christians and Infidels, such as we have seen it, is renovated, it will be the reasoning of the representatives of this superiour people, who gravely assert that humanity may be observed between the soldiers of tyrants ; but that republicans and tyrants being as opposite as vice and virtue, no mercy should be shewn between *them*. A difference in form of government, is thus made to generate, what a difference in points of faith had formerly produced ; and all the horrors of the Crusades are to be revived, because the French chuse one constitution, and the English another. In what is here remarked, there is neither occasion, nor would it be relevant to enter into any particulars of the quarrel, or any personal reasoning concerning the character of individuals. The observation might be made by a dispassionate stranger, five thousand years hence, if letters should last so long.

Courtesy, however, was by no means the only effect which Chivalry produced upon the laws of the time. Among the foremost of them is to be mentioned that fidelity to their words, on which all who had taken the oaths of knighthood, peculiarly piqued themselves. A failure in this point entailed eternal infamy upon their memory, and drove them with ignominy from the order; and so great was their respect for an oath, a promise, or a vow, that when they lay under any of these restrictions, they appeared every where with little chains attached to their arms or habits, to shew all the world that they were *slaves* to their words: nor were they taken off till their promise had been performed, which sometimes extended to a term of four or five years. (y.)

We here then behold a palpable means of improvement to the Law of Nations, which depends so much, and almost so entirely, upon good faith, there being no tribunal with any power of coercion. Its effect in enforcing the observance of *Treaties*, was indeed visible; and in the oaths which continued for a long

(y) Sainte Palaye i. 236, 237.

time

time to be taken by crowned heads in the way of guaranty or ratification, to swear *by his word, and as a true knight*, was a common custom. (z)

The well-known sentiment of John king of France need scarcely be repeated, that if honour and good faith were driven from all the rest of the world, they ought to find an asylum in the mouth and in the heart of princes. JOHN was one of the most famous knights of his time; and when his son, the Duke of Anjou, had broke his parole, and retired from the court of Edward III. he thought it incumbent on him, by way of excuse, to put himself once more in the power of that king, and accordingly made a second voyage to London, where he died. (a)

Nor was the bare fear in a knight to break his word, the only reason which men had to expect the performance of it.

(z) Le duc de Bretagne jura l'observance du dit Traité, par la foy de son corps, *et comme loyal Chevalier*, &c. Id. i. 135.

(a) Villaret, i. 288. et infr. It does not appear, however, that he became a *captive*, but merely went to excuse the fault of his son. Rapin. 4. 310. et infr.

The

The most severe, and the most infamous punishments were decreed by CHIVALRY against those knights who had sullied the honour of its Institutions. Any one judicially convicted of this, not only underwent the common chastisement for his offences, whatever it was, but his ignominious banishment from the order he had disgraced, was rendered as solemn and public as human ceremonies could make it. He was placed upon a scaffold amid a number of spectators; his arms were taken from him, broken to pieces, and trodden under-foot: the blazonry of his shield was effaced; and it was dragged, *reversed*, at the tail of a horse, through the mud. It must be observed, that to reverse the shield of a knight, was the common ceremony to denote his death; and this part of the act of degradation was therefore to shew, that when he was dishonoured by a breach of his word, by cowardice, or any other infamy, he was considered as *dead to knighthood*; as a *carcase*, to use M. Sainte Palaye's expression, devoid of sentiment.

Kings, and heralds, assisted at this ceremony. Priests, after having chaunted the service

vice of the dead over them, recited the 108th psalm, which contains imprecations and maledictions against Traitors. Three several times, the King, or the Herald, demanded the name of the man whom they were thus dishonouring. A *Poursuivant* pronounced it aloud; and the Herald answered that it was no longer the name of him before their eyes, since he had quitted it to become a Traitor, and a breaker of his word. (*Deloyal et foi mentie.*) After this, he took from the *Poursuivant*, a bason of hot water, which he poured upon the head of the dishonoured knight, to efface the sacred character which had been conferred upon him; and the latter was finally lowered down from the scaffold by cords, was placed upon a bier covered with a winding sheet, and conducted to the church, where the funeral service was again solemnly performed over his body. It was hardly possible for human invention to have imagined a ceremony more terrible, or more capable of shaking a mind, in which there was left alive the least spark of sentiment or feeling. (b)

(b) Vide the whole ceremony in St. Palaye i. 316. et infr.

When such was the punishment of a breach of honour in almost all those who acted any eminent part in the affairs of the world, we may readily conceive how much it was calculated to produce improvement in its general manners, particularly in the laws of war; and such public infamy, being more especially designed for men who were *false* and *perjured*, the dread of incurring that reputation became a real security for the contrary.

An Instrument dated 1364, preserved by Du Tillet, where he gives an account of the Knights of the Orders, purports to be "an obligation made by Messire Jehan de Gresli, Capital of Buche, prisoner of war to king Charles V. *to keep the prison agreed upon, on pain of being considered as a false, bad, and disloyal knight; a perjured promise breaker; as a mark of which, his arms were to be reversed, and he himself pursued through all the courts of justice.*" (c) In the same spirit René duke of Lorrain, making a league against France in 1486, agrees expressly in his treaty, that if he fails in his engagements

(c) Du Tillet. Recueil des Rois des Fr. 318.

he will be content to see his arms *reversed* and dragged at a horse's tail. (d)

It is not at all improbable that the custom of giving liberty upon parole (a very considerable advance) arose entirely out of Chivalry. Courtesy and good faith being so great a part of the duty of a knight, they induced him on one side to grant liberty to a prisoner upon promise either not to serve against him till he had ransomed himself, or to return to his prison when called upon; and on the other hand, when he himself was taken, they procured the most scrupulous adherence to whatever engagements he made.

Of this there are a vast variety of examples; some of them not incurious, and all of them demonstrative of amended manners. WALTERAND, Count of Saint Pol, of the imperial house of Luxembourg, being taken by the English, all ransom was refused for him; nevertheless he was allowed liberty on his word not to escape, and formed one of all the parties at the Court of EDWARD III.

(d) Garnier. Hist. de Fr. 2. 245.

where he married Matilda Courteney, a princess of the blood, who at length obtained his liberty. (e) Thomas Percy, an English knight, taken in the same war by the French, was allowed liberty to go in search of his ransom, and took an oath between the hands of four other knights that he would be bound to return, and *fight with them all four at once*, if he did not fulfil his promise. (f) We have seen the liberty given by the Prince of Wales to DU GUESCELIN for the same purpose, and that illustrious General had often himself shewn a like courtesy to his prisoners, (trusting to the known honour of Chivalry,) particularly in the case of Trouffel; to whom he accorded, in compliance with a custom which seems to have been general, (g) the space of a year, in which to procure his ransom or return to prison. (h)

During this interval, no one of course could carry arms against the party whose prisoner he was; and even though hostages were taken for his appearance, the law remained the

(e) Froiss. v. 2. (f) Id. Ib.

(g) See Chap. IX. (h) Vie de du Guesc. 28, 29.

fame.

same. Charles of Blois, in 1351, when allowed his parole to seek his ransom, left his sons in England as hostages for his return, "*Sans toute fois,*" says an old author, "*quil se pust armer avant que d'avoir payé le prix dont on estoit convenu.*" (i). In the war however of Castile, in which the Black Prince engaged only as *Auxiliary*, I find a circumstance which forms a kind of *Case* in the annals of war. The Marshal d'Andreghem had been taken by that Prince, and liberated on his parole till he paid his ransom. His captor being at peace with all the world, the Marshal entered into the service of Henry the new king of Castile, and was once more taken by Edward at the famous battle of Navaret. The Prince reproached him with breach of his word, for bearing arms against him before he had discharged his ransom, which he said was contrary to all the rules and laws of honour, and gave him a right to put him to death. The Marshal replied that he had not broken his word, since he had taken arms only against *Don Pedro* the enemy of Henry, and not against him, the Prince of Wales.

(i) Vie de du Guesc, 14.

The matter was referred to the judgment of twelve knights, who after having taken cognizance of the affair, acquitted d'Andreghem. (k) It is not here the place to examine whether this conduct of the Marshal was strictly according to the rules of war, as practised in the present day; I mention it merely to shew the growing regularity of the times. An antient Vandal, would not have been able to comprehend the dispute, and would have prevented its necessity by the instant death of his prisoner. Upon this subject of *parole* however there was another very remarkable point, which was sometimes pleaded, but I believe never regularly settled. This was the absolute liberty claimed by the enlarged prisoner if his captor happened to die before his ransom was paid. I find it in the instance of the Comte de Richemont, who being taken by Henry V. and liberated on his *parole* to return to prison when called upon, is said to have pleaded that the death of that Monarch released him from his parole, and accordingly refused to return. (l)

(k) Vie de du Guesc. 132.

(l) D'Argentrée Hist. de Bretagne 1422.

In Italy a refinement not unfamiliar, was practised in the year 1514, in the case of Gian Pagolo; who having negotiated an exchange between himself and a Spanish General, Bernadin Carvagiale, obtained leave to go to Rome upon his *parole* to return if the exchange did not take place. Carvagiale died before the exchange, and Pagolo affirmed that he was liberated from his promise upon that event. (m) Both these cases however appear unsupported by others, and are certainly not law according to the present practice.

This reliance upon each other's word, from respect to the honourable Order to which they all belonged in common, produced another advantage to the profession of arms, which evinces still farther the growing confidence of men. As in the heat of battle there might be much danger of a prisoner's being rescued; impediments were thrown in the way of giving liberty on *parole*, and might not unfrequently lead to the necessary death of the vanquished. To remedy this, the soldiers of the time in giving their faith added a

(m) Guicciard. ad. an. 1514.

regular article or condition, of *Rescued or not Rescued*; (*recoux ou non recoux*,) by which every difficulty was obviated, and the vanquished was to remain a captive at all events.

We have several examples of this in Froissart. At the battle of Poitiers, *Thomas Vercles*, an English Knight, being taken by a French Esquire, the latter whose party were defeated, justly feared the loss of his prey, whom he might therefore have destroyed on the spot. *Vercles*, however, gave him his word that *recoux ou non recoux il demuroit son prisonnier*. (n) In the following case, still more remarkable, we see even the capture of the captor, and yet so strong an adherence to the promise given, that the obligation remained to him though in prison. The whole affair is so characteristic, that it is possibly worthy being mentioned somewhat at length, and in the simplicity of Froissart's own language.

The armies of Scotland and England being in each other's neighbourhood, the knights on either side made short excursions.

(n) Froiss., v. i. ch. 163.

In one of these, James Lindefey, a Scottish Knight, met with Matthew Redeman, an English one, and a fierce battle ensued, in which the former had the advantage. Redeman, says Froissart, called out, "Messire Lindefee je me rends a vous. Voire dit le Chevalier, (d'Escoce) *recoux ou non recoux.* "Je le veuil dit Redeman, vous me ferez "bonne compagnie." The terms were agreed upon, and Redeman continued—"Quelle chose voulez vous que je face? Votre prisonnier je suis, vous m'avez conquis. Et quelle chose voulez vous que je vous face," respondit Messire Jacques. Je retourne-roye volontiers, dit Messire Matthiew, à Neufchastel, et dedans quinze jours, je me retrairay vers vous en Escoce, la, ou il vous plaira m'assigner journée. Je le vueil, dit Lindefee; *vous serez par votre foy dedans trois semaines en la ville de Haindebourg.* (Edinburgh.) Tout ce luy covenança et jura Messire Matthiew Redeman." (o) After this agreement the Knights separated, the one to Newcastle, the other to continue his excursion; but presently Lindefey falling in with

(o) Froiss. v. 3. ch. 228.

the bishop of Durham's troops, was himself made prisoner and conducted to Newcastle, where he found Redeman, who acknowledged himself still his prisoner, and they agreed to be exchanged one against the other. (*p*)

I fear to multiply examples, but the following, in the same author, is also too pointed to be passed over. The Duke of Gueldres being on his way into Prussia through Germany, was set upon in the road, and himself, with all his attendants, taken prisoners. The whole *gave their faith* to the different persons who took them, and the Duke to a simple Esquire called *Arvrant*. (*q*) The Grand master of Prussia hearing of this disaster, resolved to rescue the prisoners, and set out with a large company for the city where they were confined. The captor of the Duke being thus threatened, and fearing lest he should not be able to defend the city, resolved to abandon it; but first sent for his prisoner and bespoke him in the following terms. "Duke of Gueldres; you are my

(*p*) Froiss. ch. 129.

(*q*) Luy fiança prison, *par fey*, obligation et serment, &c.

"prisoner

“prisoner, and *I am your master* ; you are a
 “gentleman, and loyal to your word ; you
 “have promised and sworn by your faith,
 “that you will follow me into whatsoever
 “part I shall go. I know not whether it is
 “you who have sent for the Grand Master
 “of Prussia, but he is at our gates, and I
 “shall not wait for him. You are at liberty
 “to stay behind if such is your will ; but I
 “shall carry your *faith* along with me ; you
 “shall follow me to such a place ;” (and he
 named a castle in a very difficult and distant
 country). The Duke suffered him to depart
 in silence, and accompanied the Grand Master
 to his city of Cammisberg ; (*probably Königs-*
berg) where every one wondered at his ad-
 venture. He afterwards however began to
 reflect that he had not acquitted himself with
 loyalty and fidelity towards the Esquire ; (r)
 and resisting every representation which the
 Grand Master could make him, even the
 proposal to obtain *absolution* from his oath ;
 he quitted Prussia, and following his Master,

(r) Il ne pouvoit veoir qu’il fîst loyauté, & ne s’acqui-
 taît bien de sa foi,

as he was called, from city to city, arrived at last at the place of his residence.

The duties of knighthood were enforced with more efficacy, and the connection of Sovereigns rendered more intimate, in consequence of several other institutions of which it will now be our business to treat.

Possibly there are none of them so remarkable or curious as that from which some of the most celebrated antiquaries have derived the origin of CHIVALRY itself; I mean what is called by Du Cange, *Les Adoptions d'Honneur en Fils*. By these, a Knight, or Sovereign, was adopted by some other Knight or Sovereign as his Son; his honours, and arms, were communicated to him; and the names of father and son, constantly preserved between them.

These adoptions however, which were purely of Gothic original, were essentially different from the celebrated adoptions of the Romans; inasmuch as they were solely what their name imports, *adoptions of honour*, and
con-

conferred no right upon the son, to the succession of his father. (s)

They were therefore in strictness, rather *alliances*, than *adoptions*, and being the pure effect of goodwill and esteem, must have palpably contributed to extend the connections, and improve the friendships of men.

There were various modes by which they were made; but the chief of them was the *delivery of arms* from the father to his son, a ceremony which is to be derived from very high antiquity. In a former Chapter (t) we mentioned in the story of ALBOIN, the custom of the *Lombards*, by which the son of the king was forbidden to sit at the table of his father, till he had received his arms from some foreign prince. To the Lombards, however, the custom was not confined, and a vast number of instances have been collected, with wonderful accuracy and diligence, by Du

(s) Ces Adoptions n'étoient que par honneur, et ne donnoient aucune droit au fils adoptif en la succession de celui qui adoptoit. Du Cange. Dissert. 22. Sur Joinville, p. 268.

(t) Chap. VIII.

Cange, by which we discover it to have been prevalent throughout the northern nations.

This delivery of his arms to the future soldier, by some prince or state eminent for superiority of character, was coveted as a very high mark of honour and friendship, as appears plainly in the terms made use of in describing it.

"Per arma posse fieri filium grande inter gentes constat esse preconium. (u)

Desiderio quoque concordiae factus est per arma filius.

Ad ampliandum honorem ejus, in arma sibi eum filium adoptavit. (w)

All the accounts also, describe almost every adoption as having been made *inter gentes*, et *more gentium*; and the alliance, which was its evident consequence, carried upon the face of it, the strictest friendship.

There were indeed several other modes, exclusive of the delivery of arms, by which

(u) Cassiodor. L. 4. Ep. 2. 8. Ep. 9. ap. Du Cange, p. 269.

(w) Jornand. c. 57. ap. eund.

the adoption was made; as the cutting off a lock of hair, or the present of a shirt, to shew that the father and son were to be as closely united in friendship, as the shirt was in effect to the body. There were others that sprang from a less barbarous imagination; such as the joining in prayer and the holy sacraments. (x) But the chief was the delivery of arms above-mentioned.

When this took place it was called *adouber Chevalier*, and in consequence of the affinity between the words *adouber*, and *adopter*, the conjecture of Du Cange seems not ill founded, that from these adoptions it was, that CHIVARLY, or KNIGHTHOOD arose. (y)

From the prevalency of the idea of *adoption*, a kind of relationship was thought to exist between all those who had received knighthood, or (what is more agreeable to the ceremonial alluded to,) who had been

(x) Id. 272. et infr.

(y) Il ne faut pas douter que la Chevalerie n'ait tiré son origine de cette espèce d'*Adoption*, qui se faisoit par les armes, et de la ceremonie, que s'y observoit, du l'on revetoit d'armes pour la guerre, celui qui estoit adopté. Id. p. 270.

armed a knight (*armé chevalier*) by the same person. The effects of this were more beneficial than may at first be supposed, and were sometimes evident to sense. In 1320, Philip of Valois, having led an army into Italy to the assistance of the GUELPHS, was opposed, and reduced to great straits by GALEAS VISCONTI, who supported the party of the Gibelins. From his difficulty however he was relieved, solely by the circumstance of their both having been made *knights*, in other words having been *adopted*, by the same person, CHARLES of VALOIS; in consequence of which alone Galeas is said to have proposed a negotiation, when he might have attacked his antagonist with very superiour forces. (z)

The result also of this doctrine was, that those knights who were Companions of the same Order, (and thus in a more strict alliance together, than the mere *Eques Aurati*, or knights batchelors;) could never fight against one another without permission of the Sovereign. (a) Hence therefore, a new source

(z) Sainte Palaye, I. 271.

(a) Brantome des duels ap. eund.

for the extension of alliances, and the restriction of violence. The custom is well known, under which particular Sovereigns entered into a closer friendship together, by wearing each other's Orders, (as the Garter, the Golden Fleece, or the Holy Ghost,) and even to this day, the old language of *brethren*, and *Knights Companions*, is preserved among all those who wear the same Order.

At one time, this adoption may be said to have called forth the *true* paternal feelings, when it saved the life of the Marshal de Gié, who had been condemned to death ; but was pardoned by the king of France, *in consequence, as it is stated, of his having conferred knighthood upon him.* (b)

Even those who only *assisted* at the ceremony of knighting a person, considered themselves in some measure, as connected with him ; and hence, according to Saint Palaye, a man declined entering the lists against another, because of the relationship between them. “ Il sembla se regarder comme parrein de

(b) Brantome des duels ap. eund. i. 272.

"*Lancelot*, & ne vouloit point combattre son
 "filleul." (c) All these customs it must be
 owned, require not only very full proof, but
 the examples of them demand a constant
 repetition, to warrant any strong conclusions
 as to their influence. The tenor however of
 the few that have been quoted, are at least
 all one way, and if any effect arose from
 them at all, that effect must have evidently
 been to the advantage of civilization.

It was observed above, that princes, and
 men of different nations, gave into this
 custom; and in after times when various
 other institutions had branched out of *Chi-
 valry*, they fell upon another mode of *adop-
 tion*, which has been preserved ever since in
 Europe.

The reader is not to be told, that the whole
 law and science of *Heraldry*, took its rise from

(c) *Id. Ib.* This however it should be observed is upon
 the authority of a *Romance*, which the last mentioned
 author contends, and not altogether without reason, is
 equally entitled to attention, as authority for old customs,
 with many of those early poems on which other historical
 disquisitions have been so often founded.

CHIVAL-

CHIVALRY ; and when armorial *bearings* came to be universally understood, the adoption was made by the communication of the same coat. (d) Instances of this, lie scattered up and down the books. In the fifteenth century, *Ferdinand* king of *Arragon*, adopted the Count of *Chimay*, a Fleming, by giving him the surname and arms of that kingdom. In the next, *Charles V.* as a mark of his close alliance with the Elector *Palatine*, accorded him the liberty of wearing the Imperial globe upon his arms. (e) The State of Venice, granted their arms to *René d'Argenson* ; and as a remarkable, and honourable proof of the fraternity between France and that Republic, the Ambassador of the latter, upon taking leave of the Court of the former, was always entitled to receive knighthood from the hand of the king, (f) a custom which remained till very lately. The late Duke de *Richlieu*, for having saved Genoa, was created a noble of the Republic, and received a grant of its

(d) Du Cange. Glossarium. voc. Filiolatus & Dissert. 22. Sur Joinville, p. 275.

(e) Puffend. Introd. à l'Hist. Un. 3. 151.

(f) Amelot de la Houss. 1. 370.

arms to be worn with his own ; (g) and the present Lord *Malmſbury* experienced, but a few years ſince, the moſt honourable proofs of affection and eſteem from the houſes of *Brandenburg* and *Orange*, in the permiſſion to quarter their armorial bearings. (b)

This cuſtom of adoptions, evidently gave birth to another, which indeed was nothing but a natural conſequence of it ; for the relations of father and ſon, would without much refinement, produce that of brothers. The cuſtom I mean, is that famous inſtitution of CHIVALRY, known by the name of the FRATERNITY of ARMS.

This alſo, as has been well ſhewn by our guide, Du Cange, is of *Scythian* original ; and was wholly unknown to the *Romans*. (i) It produced the very cloſeſt union, and its forms were ſolemn, ſometimes to a degree of horror.

(g) Velly 336.

(b) London Gazette.

(i) Diſſert. 21. Sur Joinville, p. 260.

Various have been the ceremonies which have attended the contraction of Alliances, or Treaties of Peace with different nations. (k) Among the antient *Scythians*, this was done by letting one another blood, and drinking it, mingled together, as a mark of the close intimacy they had sworn to preserve; and this horrid, but awful ceremony, was no doubt easily adopted upon all other occasions of sufficient solemnity to demand it. It was thus that the particular friendships of private men were ratified, and when the knights of very old times, entered into an alliance of arms together, they sometimes sealed it by the same sort of practice,

It chiefly prevailed however, among the nations nearest to those climates whence it was first derived; or those that from their neighbourhood, were obliged to have much intercourse with them, and consequently to adopt many of their customs. Thus Baldwin, Earl of Flanders, Emperor of Constantinople, so low down as the thirteenth century, re-

•(k) Vide Dissert. Prelim. to the Corps Diplom. by Amel, de la Houffaye.

proaches the Greeks with falling in with it ;
 “ *spurcissimo gentiliū ritu pro fraterna socie-*
 “ *tate sanguinibus alternis ebibitis.*” (l)

When the French also were reduced to difficulties in the Greek Empire; they entered into a fraternity of arms with the king of Cuman, and the knights on either side, after mingling their blood with wine, and drinking together, called out that they were brothers of the blood. “ *Chascun de leur gens*
 “ *d’un part et d’autre, se firent saigner, et de*
 “ *leur sang, ils donnassent à boire, l’un à l’autre,*
 “ *en signe de fraternité; disant qu’ils estoient freres,*
 “ *et d’un sang; et ainsi le convint faire entre nos*
 “ *gens et les gens d’iceluy Roy; et meslerent de*
 “ *leur sang ensemble, avec du vin, et en beu-*
 “ *voient l’un à l’autre; et disoient lors, qu’ils*
 “ *estoient freres d’un sang,*” (m)

Among nations however that had advanced somewhat farther in the arts of civilization, or that had begun to feel the mild influence of Christianity, more humane modes of en-

(l) Differt. 21, Sur Joinville. 260.

(m) Joinville Hist. de Saint Louis. 94, Edit. Du Cange.

tering into these alliances were adopted. Thus in the southern and western parts of Europe, they contented themselves with sending each other presents of arms; or after the manner of the heroes of Homer, with exchanging those they actually wore. They took the sacrament together, by which they swore to preserve a lasting friendship, which was sometimes still farther confirmed by *swearing on their arms*; hence after they had entered into the fraternity, they were called *Jurati ad arma*; and hence, according to Du Cange's conjecture, the English phrase of *Sworn Brothers*. (n)

Having thus described the manner in which the alliance was contracted, I shall proceed to a detail of the duties which it enjoined; and a very slight attention to them will suffice to shew, how powerfully they were calculated, by means of their wide dissemination, to produce amendment in the law of nations. The associated parties were bound to consider one another as brothers, with respect to all operations of war; they were sworn to render

(n) Du Cange ut Sup.

mutual assistance in all enterprises ; whether of attack or defence ; they promised eternal friendship ; they professed to have but one interest ; they could have but the same friends and enemies ; they wore the same arms and livery in battle, in order that their danger, and their fame might be blended together ; (o) and the acquisitions which they made, were always shared equally between them. Every thing short of loyalty to their Sovereign, was to yield to their mutual duties ; even the more sacred flame of devotion, with which a knight, as is well known, was fired when called upon by the gentle sex, was supposed to be subservient to his duty towards his Brother in Arms, and love itself was thus forced to give way to friendship. (p)

With respect to foreign States, and knights of different nations, it was with the *Fraternities of Arms*, as with the *Adoptions* ; they were contracted all over the world, and some-

(o) Id. Ib. & Sainte Palaye. i. 224.

(p) Une Demoiselle ayant en vain réclamé la protection d'un *Chevalier*, celui ci se disculpa en alléguant la nécessité dans laquelle il s'étoit trouvé pour lors, de voler au secours de son frere d'armes. Mem. Sur la Cheval. i. 217.

times when the parties had not even seen one another ; as was the case with the king of *Aragon*, and PHILIP, the good Duke of *Burgundy*, in 1458. (q) Kings, and other Sovereigns, and even whole States, entered into them ; and by drawing them thus closely into the bonds of interest and affection, founded upon the very point of honour ; they must have contributed powerfully to polish the rugged manners, and soften the barbarity which had so long prevailed.

They visibly interfered with many political engagements, *Henry de Transtamare*, King of *Castile*, requesting the loan of a considerable sum of money from the Duke of *Bourbon*, was refused upon the sole ground of his being the enemy of *Boucicaut*, the Duke's *Brother in Arms*. (r) Possibly, the Duke of *Bourbon* might have been influenced by other considerations, and only fell upon this as an excuse. From that very circumstance however, the Institution was of consequence, in thus furnishing him with reasons for refusal,

(q) *Montfretet ad an. 1458.*

(r) *St. Pal. i. 230.*

legitimate according to the practice of nations.

These alliances however as has been observed, did not interfere with the duties which the knights owed to their Sovereigns. When ever therefore two Brothers in Arms, were of different nations, and war broke out between them, the alliance was *ipso facto* at an end. (s) Nevertheless it can hardly be supposed, that its effects should immediately cease. Men who had probably long continued in the closest bonds of intimacy; had shared the same dangers; and often, possibly, rescued one another from death; could not be expected to meet in battle with the same personal enmity, with which other warriors often engaged. In such a case, though bound to molest one another in the course of a superiour duty; they would naturally endeavour to soften the rigours they were obliged to inflict, and would certainly never extend them beyond absolute necessity.

In the life of Du GUESCLIN by Menard, (t) there is an account of the separation of that

(s) Sainte Palaye. i. 239.

(t) See p. 248.

general, and Hugh de Calverly, his *Brother in Arms*, upon the breaking out of the Spanish war. Calverly, being an Englishman, tells Du Guesclin, as a thing of course, that he must part from the alliance, but speaks in the most friendly terms of their long companionship. Bertrand waves the settlement of their accounts, which he had proposed; tells him that it was right he should follow his master; and ends this last of their amicable interviews with a kiss. "Moult piteuse," adds the author, "fut la departie." Such men could never afterwards have met one another in battle, with more enmity than the mere letter of their duty required of them; and thus plainly, did this curious and beneficial institution tend to bring the maxims of EUROPE to a level with the *particular* Religion and System of Morality pursued by its nations. Thus also did they come to the *particular* and humane application of that *general* definition of the Law which we adopted in a former chapter, namely, that they enjoin us to do one another as much good in peace, and as little harm as possible, in war, consistent with our mutual interests. (u)

(u) See Chap. II, p.

We have an example of this at the siege of Soissons in 1414. When Burnonville, the commander of the place, was ordered to death by the French General; numbers of the latter's officers interceded for his pardon, and offered large sums for him by way of ransom. And this they did, says an old author, from esteem for his valour, and from the remembrance of the many campaigns they had made together in Lombardy and in France, *ou ils avoient été amis, at freres d'armes.* (w)

When Du Guesclin also, so often mentioned, was leaving Bourdeaux in order to raise his ransom, he was offered thirty thousand livres towards it by his friend Hugh de Calverley, who happened to be on the spot. Calverley rested it upon the unsettled account which he said was between them for plunder and prisoners, in which he had remained his debtor. (x)

There was another point of *Chivalry*, which

(w) Chron. de St. Dennis ap St. Palaye. i. 278.

(x) Vie de B. de du Guesc. 131.

must have also tended much to introduce personal friendships between the warriors of the times. As the knights were perpetually passing from one country to another, in search of objects worthy their prowess, and which might give them opportunity to fulfil their oaths; they were naturally thrown more into an intercourse with other nations than they had ever been before. By these means, they acquired a mutual esteem for one another; their prejudices were by degrees softened down; and the personal ferocity with which their ancestors had generally plunged into battle, was insensibly worn away. Exclusive of this, by being in a foreign land, and often in the midst of danger and distress, they were frequently under the greatest obligations to persons whom, but for this, they possibly might have been taught to hate. It indeed had a plain effect upon the very terms and institutions of CHIVALRY; and whenever these military wanderers had received marks of hospitality or other kindness in distress, they swore eternal friendship to their benefactors, professed themselves to become their *grateful* knights, and

and accordingly were expressly called *Chevaliers de Reconnoissance*. (y)

Hitherto we have considered the influence of *Chivalry*, merely as it concerned the conduct of individuals; we have still to examine it, as it affected the general operations of States, when they were called into action against one another. In this, the most obvious feature is the care and regularity with which they warned one another of their intention to put on the character of *Enemy*. The old Roman punctilio in this respect, which had been totally overlooked among the Scythian nations, whose indiscriminate passion for slaughter deemed it unnecessary; revived with augmented vigour, during the growth of *Chivalry*. It was beneath the honourable enmity of a *Knight*, who was ever scrupulously ruminating upon what was expected of his character, to invade an enemy unawares; he scorned to take advantage of him, even in the heat of combat; much less could he deliberately make an attack which all the rules of courtesy would have forbidden. When

(y) Mem. sur la Chev. i. 235.

driven therefore to open war, it was a necessary consequence to inform his enemy of it, and the intention was denounced in the most solemn manner by an officer whose function was generally considered as sacred and inviolable. Hence arose the modern *Declaration of War by Heralds and Pourfuitants*; a ceremony which, it must be owned, seemed originally to spring from magnanimity alone, without any more refined views of *first demanding reparation*, or the necessity of authorising *legitimate war*. But whatever was the motive, the effect was the same; and the world made no small flight from that abyss of disorder, which had spread over it during the earlier ages, in introducing this necessity for a *declaration of war*, before hostilities had commenced.

We have a full example of this, in the war between Edward III. and Philip of Valois. The celebrated *Walter Manny*, in the true spirit of *Chivalry*, had sworn to the ladies that he would be the first to enter France and take a town.

The

The same spirit however, forbade him to stir a step, till the numerous negotiations that were pending were determined; and a declaration *in form*, being at last sent by the Bishop of Lincoln, he waited, says Froissart, till he knew, or at least guessed, that it had been published, and not till then, broke in at the head of forty lances. (z)

These declarations were made in various ways; for the most part by *Heralds*, and sometimes by *letter*.

The declaration of CHARLES V. against EDWARD III. is minutely described by Froissart. It was done by a *letter*, the bearer of which was only a servant; who upon coming into the presence of the king, fell upon his knee, and intreated him to read the contents of his packet, which, as he observed, he neither did, nor ought to know.

The king was surprised at the message, and more at the letter being borne by a common servant; he shewed it to his Council; they ex-

(z) Froissart, v. i. ch. 37.

amined every part of it, turned it on every side, and at length, *upon observing the Seals*, pronounced it genuine, and gave orders accordingly for the war. (a)

In the declaration of EDWARD IV. against LEWIS XI. we find the very essence of regularity. It was written, says *Commines*, in fine language and style; and sent by Garter King at Arms. It required him in express terms, *to deliver up the kingdom of France to him as his right, in order that he might restore to the Church, the Nobles, and the People, their antient liberty*. In the case of refusal, he protested that all the evils of the war would fall upon the head of LEWIS.

The King received the Herald well; and dismissed him with a present of three hundred crowns, and thirty yards of crimson velvet. (b)

In the twelfth chapter, we saw the extent and prevalency of private wars under the

(a) Froissart, I. ch. 252.

(b) *Commines*, L. 4. Ch. 5.

Feudal System, and these although carried on by mere subjects, were however conducted with all the formalities that attended the more important quarrels of nations. The necessity and form of the declaration were points, as it was observed, universally laid down; and as the practice of private war, was one of the earliest and most universal in Europe, and the use of *Heralds*, and these *solemn declarations*, was at its height, as a science, some time after the commencement of the period before us, it is not improbable that this general practice of independent nations, arose out of customs first adopted by inferior vassals. (c) The seventeenth chapter of the Golden Bull, which regulates the manner of commencing war among the German princes, (d) contains such excellent principles that the most civilized States might derive improvement from their inspection.

“Eos, says the law, qui de cætero adversus aliquos, justam *diffidationis* causam se habere fingentes, ipsos in locis ubi *domici-*

(c) See Chap. XII.

(d) Anno. 1356.

“ *lia non obtinent, aut ea communiter non in*
 “ *habitant, intempestive diffidant*; declaramus
 “ *damna quæcumque per incendia, spolia,*
 “ *vel rapinas diffidatis ipsis, cum honore suo*
 “ *inferre non posse.*

II. “ Et quia patrocinari non debent alicui
 “ *fraus et dolus*, præsentī constitutione in
 “ perpetuum valitura sancimus, diffidationis
 “ hujusmodi quibus cumque dominis aut per-
 “ sonis, cum quibus aliqui fuerunt in socie-
 “ tate, familiaritate, vel honesta quavis ami-
 “ citia conversati, *sic factas vel fiendas in pos-*
 “ *terum non valere*; nec licere prætextu dif-
 “ fidationis hujusmodi cujuslibet quempiam
 “ invadi per incendia, spolia, vel rapinas, nisi
 “ diffidationis *per tres dies naturales ipsi diffi-*
 “ *dando personaliter, vel in loco quo habitare*
 “ *consuevit, publice fuerit intimata*; possitque
 “ de intimatione hujusmodi, *per testes idoneas*
 “ fieri plena fides. Quisquis secus quempiam
 “ diffidare vel invadere modo præmisso præ-
 “ sumperit, *infamiam* eo ipso incurrat, *ac si*
 “ *nulla diffidatio facta esset.* (e)

(e) See the *Golden Bull*, Cap. xvii. de Diffidationibus.
 ap. Du Mont.

But of all the customs of war, which drew their origin from the spirit of *Chivalry*, no one is more remarkable than that noble confidence in one another displayed by enemies, in agreeing to meet regularly in battle at a particular time and place, subject to particular conditions.

The same magnanimity which deemed it necessary to warn an enemy by a regular declaration against him, went so far, after hostilities had commenced, as to tell him the *precise hour*, and the very *spot*, of the intended attack. Sometimes also the Chiefs would fly out of the ranks to meet one another. They were generally known by their arms, or they themselves, before the shock, discovered to each other, their names and reputations for feats of *Chivalry*, in language and manner resembling the heroes of Homer. At the battle of the bridge of Lussac, the celebrated CHANDOS, while in the act of attacking them, accosted St. *Julian* and *Carlounet*, the French leaders, in the following terms: "It
" is now a year and a half since I have fought
" you, and God be thanked you are now
" before me; we will now see who is
" strongest

“strongest in this Country, you, or I; my
“name is JOHN CHANDOS; I have heard of
“your great feats in arms, and you have here
“an opportunity to prove your reputa-
“tion.” (f)

Amid the numerous battles and sieges which every day took place, during the same war of Edward III. against France; we have frequent occasion to observe this great regularity: In 1339, the armies of that prince, and Philip, drawing near to one another in Picardy; there went, says the historian, on the Wednesday, a herald to the French camp, to tell the king that EDWARD of ENGLAND had halted in the field, and sent to demand battle with him, power against power. King Philip willingly accepted the challenge, fixed upon the Friday following for the combat, and the herald returned to the English camp well furnished with beautiful mantles of fur, which had been given him by the king of France and his lords. (g) The same ceremonies were practised, near a century after-

(f) Froiss. v. i. ch. 276.

(g) Froiss. v. i. ch. 41.

wards, previous to the battle of Agincourt. Heralds had come frequently to the king of England with offers of battle from the French. Henry contented himself at first, with saying that he would not avoid the combat. On the 22d of October however, 1415, another challenge being sent, he accepted it, and made a present to Montjoy St. Denis, (*b*) who brought it, of a robe worth two hundred crowns. (*i*) The same practice occurred again, previous to the battle of Verneuil, won by the Duke of Bedford in 1424, (*k*) and the famous battle of Flodden Field was fought by a like appointment. Previous to this last, the *Earl of Surry*, says *Speed*, sent Rouge Croffe to king James, with proffer of battle, *to be done* upon Friday the month of September, (1513). The herald also bore a message from the Lord Admiral, that he was come *in person* to justify his act against Andrew Barton, and would abide the last drop of his blood in the vant guard of the field. (*l*) This

(*b*) The principal Herald among the French, answering to our Garter King at Arms.

(*i*) Villaret. 3. 170.

(*k*) Monstrelet.

(*l*) Speed. 767.

Andrew Barton had been a famous pirate, and while the two nations were at peace, had been attacked, and slain, *in a private expedition* of the Admiral, then only Sir Thomas Howard, which had been much resented by James ; and we have here a fresh instance of the manner in which the differences of *Individuals* entered into and coalesced with public national quarrels.

There are various other examples of the practice we are recording, which as it has been sufficiently illustrated, it would be unnecessary to mention farther. (*m*) But we cannot quit the point without taking notice of a case particularly evincive of this spirit, in the celebrated letter of *Henry de Transmare*, to the *Black Prince*, in 1367, when the latter was about to enter his kingdom in order to restore Peter the Cruel. "We wonder," says the Castilian, "at the reason which can induce a prince of your power, to invade the poor territory which God has given us, but as we know you possess the favour and

(*m*) See however Monstrelet. v. 2. ad ann. 1441. when the Duke of York *challenged* Charles VII. to a *pitched battle*, on the banks of the *Oise*.

“fortune of arms, more than any other
“prince of your time, and that you therefore
“ardently seek the combat; we request you
“to point out *by what pass you mean to enter*
“*our country*, and we will meet you there
“and give you battle. (n)”

These challenges between whole armies, which ended generally in what are called *pitched battles*, arose I think evidently from that spirit of the times, which induced men to seek personal combats or duels, one against the other. The wide prevalency of the custom of *Duelling* among our ancestors, in judicial, as well as military matters, is too well known to be discussed; and this custom transfused itself easily into the quarrels of nations. Kings, and Generals, were not unfrequently the most distinguished knights of their time; and when they met at the head of armies, they were often more willing to shew their personal prowess in the lists, than their powers of generalship, in combining and managing the force of their troops. It was besides customary in those times, for the

(n) Froiss. v. i. ch. 237.

personal quarrels of these high characters, to be the sole or chief quarrel of the nations they commanded ; and from both these causes arose the custom of *challenges* to single combat, between the leaders of armies, so universal in the practice of the earlier nations. Illustrious instances of this, are prominent in the history of the world. One of them, in the eleventh century, occurs in the challenge of the Emperor Henry IV. to the Duke of Swabia, upon a report, spread by the latter, that he meant to assassinate him ; (o) and in the twelfth, it is said that Philip Augustus offered to settle his differences with Richard I. by a combat of five on a side ; a challenge which Richard accepted, *provided the two kings should be of the number.* (p)

When EDWARD III. challenged the realm of France from PHILIP of VALOIS ; in order, as he said, to spare the effusion of Christian blood, and the evils, which they were bound as much as possible to prevent, from falling on their kingdoms ; he proposed by a Herald to terminate the difference, either by *duel*, or by a combat of one hundred on

(o) Heiss. i. 73.

(p) Diceto. 676. 50.

each side. He addressed the cartel simply to Philip *of Valois*, without the addition of his title of *king of France*; which made him return, that he was not bound by *law* to take any notice of such sort of address; nevertheless, if Edward *would stake the kingdom of England against that of France* he would enter the lists. (q) A similar conduct was observed by Henry V. some little time before the battle of Agincourt, who challenged Charles VII. to battle, the *kingdom to depend upon the issue of the contest*. (r)

The usurpation of the father of this last king, produced a challenge, and a regular declaration of war from two private noblemen, friends of Richard II. who in the very spirit of knighthood, stood forth as his champions on this occasion. The first was from the *Duke of Orleans*, who reproached him with the death of the king of England, and bade him fix upon any place between *Bordeaux* and *Angouleme*, there to combat with a hundred knights of a side. Henry answered by giving him the *LIE DIRECT*. "By the

(q) Tho. Walsing. 149.

(r) Speed, 642. Rymer, 19. 313.

"honour

“honour of God, of our Lady, and St. George,” said he, “you lie *falsely* and *foully*, “when you say we have had no pity upon “our late Sovereign.” (s) The *declaration of war*, was from the Count of Saint Pol, and was conceived in language the most regular and precise. He accuses him in direct terms, of the murder of Richard, which (the king being his friend and Brother in law) he says, “he should think himself worthy of the indignation of the Deity, and of all honourable persons, if he did not revenge.” Wherefore, he continues, “*par ces presentes, vous fais à savoir, qu’en toutes manieres que je pourray, je vous nuiray, et tous les dommages, tant par moi, comme par mes parents, tous les hommes et sujets, je vous feray ; soit en terre, ou en mere.* (t)”

But the most celebrated example of this kind, appears in the course of the quarrel for Sicily, between Peter of Arragon, and Charles of Anjou, in 1283. The unfortunate CONRADDIN, whose story has already been touched upon under another head, (u) when

(s) Villaret, 2.410.

(t) Monstrelet, v. i. ch. 13.

(u) Chap. IX.

he ascended the scaffold at Naples, threw his glove among the people, and begged that whoever got possession of it, might carry it to his Cousin the prince of Arragon. The laws of CHIVALRY, which were those of the times, gave much consequence to this action, unimportant as it would appear in modern days; to throw down and take up a glove or gauntlet, being considered as nothing less than an offer, and acceptance; and the slender title of Peter, received no small support from it. (v) A fierce war broke out between the rivals; in the course of which, the Arragonian being driven into great straits, with his whole army, sent a challenge to Charles, to end their difference by a combat of an hundred on each side. The spirited Angevin, though at that time sixty-three years of age, (w) made no scruple to accept the proposal; all general hostilities were immediately suspended; and commissioners were appointed to draw up the conditions, by which it was agreed that the vanquished, or he who failed to come to the field, should be esteemed *perjured; false; unfaithful; a traitor; eternally*

(v) Giannone. 19. 2.

(w) Burigny, 2. 210.

infamous;

infamous; unworthy the name and honour of a king; and incapable of all dignity. (x) The king of England, EDWARD I. was requested on this occasion to be judge of the lists, which he personally declined; he however assigned to them a field of combat in the plain of Bourdeaux, a neutral territory, and his *Seneschal* was sent to hold the Court in his name. It was in vain that the Pope interposed in this affair, by shewing Charles that the proposal of the king of Arragon had been merely to gain time; by excommunicating the latter prince; and threatening even himself with the same fate if he proceeded: The honour of *Charles* was pledged, and he would for ever have been a stain to CHIVALRY had he declined a challenge which he had once accepted. He therefore appointed his son, regent of his kingdom; provided his army with proper generals; and repaired to *Bourdeaux* with his hundred knights.

The event of this remarkable affair is not without curiosity, and has given occasion for much dispute between the Spanish and French

(x) Rymer, 2. 227. 228. 229.

historians. It is agreed on all sides however, that the king of *Arragon* repaired also to *Bordeaux*, and appeared before the *Seneschal* (some say in the disguise of a simple Esquire) the evening previous to the day of combat. He here declared that he had certain authority, for supposing the king of France, the nephew of *Charles*, (who it is also agreed had approached the English frontiers well attended,) meant to surprise him; that he therefore could not go into battle in proper security, and he thought it right to retire from so hostile a neighbourhood, leaving in the hands of the *Seneschal*, his casque, his sword, and his lance, as marks of his appearance. The matter here ended, and both kings filled the world with manifestoes: those of the *Spaniard*, directed against the king of France; those of *Charles*, reproaching his antagonist with cowardice and perfidy. (y)

In the course of the same quarrel, about a hundred and fifty years afterwards, another challenge ensued between the heads of these

(y) For the challenges and articles of combat in this affair, see Rymer, *ibid.* for other particulars Nangis. *Contin. of Joinville.* an. 1283. Velly, 3. 398. et *infr.*

rival houses ; and though differently related by the writers of the two parties, there is a considerable proof of regularity in both. One account states, that *René* duke of Anjou, the pretender to the crown, challenged *Alphonso* king of Arragon to single combat, which was at first refused *because their ranks were not equal*, but was afterwards accepted. The meeting however was prevented by the nobles of *René*, on the plea *that their interests being concerned, he had no right to engage without their consent*.

According to the other relation, the challenge was not to *single combat*, but to a *general battle*. *Alphonso* accepted it, insisted that the *challenged* had the privilege of appointing time and place, and fixed upon the plain of Nola, where he waited for *René* eight days. On the other hand, *René* claimed the right to appoint time and place as being the *challenger*, and sent to tell *Alphonso* that he would attack him in his camp. The affair went off upon this point ; but however it might have been determined, the dispute itself discovers a great advance in the laws of war.

As

As these combats most probably took their rise from the practice of duelling in judicial matters, it is not unwarrantable to imagine that they partook in a great measure of the ceremonial observed in the latter. The following oath, administered by the Wardens of the lists, is a curious part of it, and well describes the distrust, and superstition of our ancestors. "A de B. ye shall lay your hand
 "ayen on the holy gospels, and swere, that
 "ye shall have no moo wepnes, or poynts,
 "but tho that been assigned you by the con-
 "stable and mareschall; that is to wite, *gleyve*,
 "*long swerd*, *short swerd*, and *dagger*; Nor
 "no knyfe, small ne grete, ne none engine,
 "ne none othir instrument with poynt. Nor
 "stone of vertue, nor hearbe of vertue, nor
 "charme, nor experement, nor none othir
 "enchauntment by you, nor for you, whereby
 "ye trust the better to overcome C. de D.
 "your adverfarie that shall come ayens you
 "within these lists in his defence." (z)

In general, the reward of the Victor in these combats, was something substantial and

(z) Dugdale Orig. Jud. p. 82. See also other curious particulars from 75 to 86.

fixed before hand, exclusive of the honour acquired. The ransom of the vanquished, in case he was left alive, belonged to him of course; and in that case also his body, as a mark of entire submission, was to be carried out of the field as if he had been actually slain. (a)

In the combat between Du Guescelin and Truffel, a hundred gold florins was staked to be paid by the vanquished as a treat for the persons who had charge of the lists.

In a combat of seven English against seven French knights near *Bordeaux*, in 1402, it was stipulated before hand, that each of the vanquished should pay a diamond ring to the victor. (b)

In the challenges above mentioned, we saw *whole kingdoms* proposed as a stake, to remain

(a) See the particulars of the combat between Du Guescelin and Thomas of Canterbury, where the latter, having his life given him, was nevertheless borne out of the lists as if he was dead. *C'estoit la coutume*, adds the author, d'emporter ainsi les vaincus, quand leur ennemy, leur avoit donné la vie, quoy qu'ils n'eussent pas été blesez. Vie de B. Du Guesc. 35.

(b) Villaret, 2. 411.

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with the victor, and hence I think very probably arose another custom of CHIVALRY, which without doubt has been the foundation of some of our present laws of war. It was a received practice it seems, when a place that was besieged was hard pressed, to offer to surrender, *provided no army came to its relief within a fixed period*; and in case it did, the besiegers were bound *to wait for it, give it battle, and the place was to remain with the victor*. This point is laid down by M. de Sainte Palaye, (c) though contrary to his usual practice, he gives no examples of it. I however discover one exactly in point, and there are a variety of others which approach very near it.

In the year 1373, the French pressing the siege of *Brest*; the garrison agreed to surrender, *if within six weeks an English army did not arrive, strong enough to meet them in the field, and give them battle*.

The succouring army was also bound, *not to throw any relief into the place, until they had actually waited the issue of the combat*; and

(c) Mem. sur la Cheval. i. 196.

hostages

hostages were given for the performance of the whole. Within the time, the EARL of SALISBURY arrived with a large fleet, but few foldiers; and the French General, DU GUESCELIN, who lay encamped in expectation of his arrival, sent to him to give battle according to the agreement. The affair forms *a case* in the laws of the times. SALISBURY remained seven days within strong intrenchments, without succouring the town, or attacking the French; but on the seventh, he sent to tell *Du Guescelin*, that he must fight that very day, or the next he would throw in the promised succours. The Constable accepted the challenge, but SALISBURY then pleaded that his men were chiefly *Sailors*, and that he wanted Cavalry, with which he even required his enemy to furnish him; at all events protesting that as he had none, he would not stir from his intrenchments, which the other was bound to attack or give back the hostages. Neither the one nor the other was done; and great debates arose upon this in the English camp; one party contending that if they did not go out to give battle, they could not, according to the conditions,

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relieve

relieve the town; (*d*) the other affirming that it was sufficient they were upon the spot, and ready for action; that the field of battle was not stated; and that every good general endeavoured as much as possible to chuse his own ground. This last opinion carried it, and the place was succoured at the expiration of the time. On the other hand the French contended, that the words *to give battle*, meant an offensive operation, and not the defence of intrenchments; that SALISBURY was bound to attack them, and not wait for the attack himself; and as the town was relieved, contrary, as they said, to the Treaty, they marched off the field without parting with their hostages. (*e*) The affair is not without its difficulty, but which ever way it might have been settled, to be able to start such difficulties discovers a pointed advance in laws of war considered as a *Science*. During the same war, several other sieges

(*d*) It is to be observed that the English being all along masters of the *Sea*, could have succoured the town when they pleased, and were only restrained by the laws of their agreement.

(*e*) Vie de Bert. Du Guesc. 243, 244, 245.

exhibited

exhibited the same sort of practice, as that of *Derval*, (f) where the conditions not being fulfilled, the hostages were put to death ; and of *Moissac*, where no relieving army appearing, the place was surrendered. (g) The custom appears several times afterwards, and indeed is well known in the annals of modern war. At the famous siege of Harfleur in 1415, the soldiers taken, were allowed their liberty, upon promise to repair to Calais as prisoners, *provided the king was not overtaken in his march thither and defeated by a hostile army* ; (h) and the people of Bourdeaux being much reduced in 1451, a regular treaty was drawn up for the surrender of the whole of Guienne, *in case the king of England did not, within a certain time, send an army sufficient to protect the town, to give battle, and to defeat the French*. In consequence of this the French army on the appointed day presented themselves before the walls ; proclamation was made several times by the Inhabitants, *summoning the English to assist them* ; and at sunset, none appearing, the French retired within

(f) See Chap. IX.

(g) Froiss. v. ch. 320.

(h) Villaret.

thir camp, and the capitulation was executed the next day. (i)

Such is the pointed regularity and improvement which the Law of Nations received, from the celebrated institutions of CHIVALRY. Institutions which have long gone by, and faded before the general improvement of manners which time has brought on. In the ages however when they flourished, they were of essential consequence to the well-being of the world, and as far as they went, supplied the place of philosophy itself.

(i) Villaret, 4. 247, 249. The words of the proclamation were, *Secours de ceux d'Angleterre, pour iceux de Bourdeaux.*

CHAP. XV.

OF THE INFLUENCE OF TREATIES AND CONVENTIONS.

THE FEUDAL SYSTEM, though it introduced a more regular order of things, can scarcely be said to have improved the Law of Nations. CHRISTIANITY, as we have seen, did both good and harm; the former, while its precepts were properly enforced; the latter, when they were corrupted by an ambitious Church. CHIVALRY tended in the most direct manner to amend it; and at length by TREATIES and positive CONVENTIONS, Nations were habituated to attend to it, with that minuteness of investigation which approached to Science. It is of these last that we have now to treat, and though the materials which the earlier ages afforded, are barren in comparison with those of later times, the enquiry will not be altogether ungrateful.

By *Treaties and Conventions*, I do not mean merely those *Agreements* which men fell upon,

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in

in order to bring about a cessation from *War*; but all those DEEDS, (whatever they were,) by which some uncertainty was put out of doubt; some contingent difficulty smoothed away; and the natural rights of mankind not unfrequently trenched upon, in order the better to enjoy those that remained. This had long been adopted by what was called the municipal law, and society was yet young when it was widely disseminated. Yet the Law of Nations, as we have seen, had gone on long before the Sovereignities of the world had thoughts of fixing, by solemn *Convention*, any part of the uncertainty of the state of nature, in which they were supposed to continue.

As however the Individuals of a particular Society, for its better support, made daily invasions upon the law of nature by *consent*; so the States of the world found they could uphold the kind of Society which they observed among one another much better, by *consenting* to things which by the law of nature would at least have been left doubtful.

Amid

Amid the barbarous eruptions, and during those violent throes which gave birth to the present States of Europe; ferocity, and the right of the strongest were so predominant in all operations, that men were extremely irregular even in the savage customs which governed them. They thought very little indeed, of proceeding upon any fixed rules, and still less of the refinements which are generally their attendants. Some sort of agreements no doubt they had, for the better conduct perhaps of their military operations; and when exhausted in their endeavours to destroy one another, they might be made to comprehend the nature of a *Peace*, or rather of a *Truce*. But of the utility of those conditions which were to decide upon future conduct, or which admitted of any nicety in their construction, they seem never to have been aware.

It was reserved for the ages before us, to witness the birth of those complicated interests, in consequence of the growing connections and the *Conventions* of States, the knowledge of which it required no little attention

tion to obtain, and which in later times compose that extensive and interesting Science called the DROIT PUBLIC. Even in this period, the difficulty of settling a number of contending rights among violent and unenlightened men was so great, that they were generally induced to content themselves with mere *Truces*, and nothing therefore is more common through all the histories, than the *expiration or the renewal of the Truce*; by this the contracting States agreed to quit the character of enemies, though they could not become friends, and so hard was sometimes the task of finally settling an intricate contest, that a truce was actually once entered into by LEWIS XI. and EDWARD IV. to continue in force *one hundred years* after their deaths. (a)

We have already remarked, (b) that the periods previous to the eleventh century, had witnessed few *written Conventions*, except such as relate to ecclesiastical matters. But the

(a) The Treaty is in Fred. Leonard. tom. I. 217.

(b) Chap. VIII. ad. fin.

closer intimacy of States after that æra, the causes of which we have just been contemplating, not only added to the number of their *Treaties*, but produced much variety in their nature and quality. Accordingly, from the eleventh century we have occasion to observe, a number of *Treaties* (and those perpetually increasing) relative to the marriage of Princes; the exchange, or sale, or other settlements, of their dominions; the terms of their alliances; suffrages for the Emperor; or leagues for mutual defence. The connections of Society were extended, and the business of Europe began to thicken, as the laborious volumes of an infinite number of *Fœdera* bear ample witness.

By these, the nations that were emerging from the grossness of ignorance, became acquainted with other modes, than the savage one of war, by which to *alienate*, or *exchange* the Sovereignties and *dominions* which they legally possessed. By these, they acquired a just power of taking part in one another's affairs, founded on rights, different from the brutal one of the strongest, which had hitherto

governed them: By these, also, nations far distant, were introduced into a friendly intercourse together; mutual prejudices began to give way; the ruggedness of one set of manners participated of the polish of another; Commerce was extended; and even new States arose *peaceably* out of old ones, certainly without extermination, and almost without blood.

Hence the compiler of the *Traité de Paix* from the Peace of *Vervins* to that of *Nimeguen*, has by no means been ample enough when he divides all Treaties under four heads, namely, those of PEACE, of TRUCE, of CONFEDERATION, and of COMMERCE. (c) The whole history of Europe, and particularly the view we have taken of it, demonstrates that the conventions of men have a much broader foundation to build upon, and it will be the object of the following divisions to prove the truth of the observation.

I am well aware that it may be questioned in this place, how far the particular rights conferred or taken away by *Treaty*, are the

(c) In Praef. 2.

result of the *Law of Nations*. That law, it may be said, permits us to agree upon certain points by Treaty, which points, when agreed upon, become legal by that *Treaty*, and not by a general *Law of Nations*; so that accurately speaking, all that the latter amounts to on the subject is, the one general proposition, *that we may determine upon certain things by agreement.*

All this is incontrovertible; but there is still something left for the law to do, with respect to what shall form the *subject matter* for Convention to work upon. For though it may leave a vast number of points at the absolute discretion, or even caprice, of Convention; it by no means goes so far as to say, that any thing which the heart of man can devise shall be *legal, because it is determined upon by previous Institution.* We have seen that the Christian morality, is the true foundation of the Christian Law of Nations; however strong therefore men may chuse to render any point they may have in view by *Institution*, it is not the less unlawful, if contrary to the principles of the Christian morality.

For

For example, if one nation shall publish before hand to the world, by a solemn deed, or vote, or by some other public Institute, that henceforward it will propose to itself for the prime object of its politics, to raise commotions among all its neighbours, or to destroy all the existing Governments in the world, because *they* think their Constitutions are not founded in *freedom*: This solemn deed, or vote, or public Institute, is not *on that account* legitimate according to the Law of Nations, *at least among those who pursue the Christian morality*. If the nation however thus publishing such a deed, does *not* pursue the Christian morality; or quits it after having pursued it; or *votes* it a forgery; *then* it may indeed conceive its conduct to be lawful, *according to a law of nations of its own*, though at the expence of being driven from the pale of those nations who pursue a different one. Such has been the conduct of the *French Republic*.

On the other hand, if any two nations, professing still to abide by the Christian morality, enter into a Treaty together to do that which is *absolutely contrary to the laws by*
which

which they profess to be governed: Such an object though stipulated for by Treaty, is equally unlawful with the other. If therefore they agree by *Treaty* to annihilate, or swallow up a particular State that has not offended them, merely because the conquest of that State is convenient for them; no one can say that such an object is lawful *because sanctioned by Treaty*. Such has been the conduct of Russia and Prussia. (d)

We see then how the points stipulated for by Conventions are dependent upon the Law of Nations; Not because the *Law* asserts that particular things are legitimate which are only rendered so by *Institution*; but because it can lay its finger upon what shall *not* be legitimate. (e) In this respect therefore it bears a close resemblance to municipal law.

(d) Towards Poland.

(e) Item fœdera pacis et Induciarum possunt sub hoc capite collocari; non quatenus servanda sunt postquam sunt facta, hoc enim potius pertinet ad JUS NATURALE, sed quatenus admittenda sunt et non neganda, quando debito modo et rationabiliter petuntur: hoc enim licet sit valde consentaneum rationi naturali, tamen usu ipso, et JURE GENTIUM videtur magis formatum, et sub majori esse obligatione.

Suarez de Leg. ac Deo Legislat. L. 2. C. 19. S. 8.

The

The latter cannot determine that an individual owes a particular duty to another individual, which has not before been prescribed; until it is pleaded that he does so by express convention, or deed. It can point out however what an individual shall never owe to another, in spite of all the Conventions in the world. A contract from A. to sell a certain commodity to B. is binding.—A contract from A. to pay so much money to B. *provided he kill the king*, can never bind.

We proceed then to consider the effect which Convention has had upon the law before us, in conferring certain rights upon men which they would not have had by mere natural law. And first of its effect on the peaceable alienation or other change of *Sovereignty* and *Dominion*.

This was brought about, exclusive of the right of Conquest, by Treaties of *Marriage*; of *Sale* or *Exchange*, by *Renunciation*; by *Bequest*; by *Gift*; by Treaties of *Protection*, or what was called an *Unequal Alliance*; and by *Treaties of Confederation*.

OF

OF TREATIES OF MARRIAGE.

AMONG the nations of Antiquity, and the Infidel people of modern times, the effect of marriage upon the political conduct of States was very small. The form of government which prevailed in the Republics of Greece and Rome did not admit of any *personal* rights of sovereignty; and even after the establishment of the Emperors, there are no instances of the annexation of any dominion to their female progeny. Among the *Mahometan* nations the well known contempt in which their women were held, even by their religion, was a still greater bar to this sort of Constitution. The *German* and *Scythian* nations however, amply repaid to the sex, the injustice which they had sustained from others; and by far the greater number of them admitted females to almost equal rights, in this respect, with their brothers and husbands. But as the husband became the administrator of his wife's power during her life, and the children succeeded of course to the enjoyment of their inheritance, this law of the Western nations, became an obvious

channel for the transfer of dominion ; and different States were thus united into one great Empire, or one Empire was split into different States, by means the most regular and peaceable, and nearly peculiar to EUROPE.

The reader's own observation will have pointed out to him a variety of instances of this, throughout the kingdoms of the north and west. The vast power of the English in France ; their sovereignty over almost the whole western coast of that country, and the claims of EDWARD III. and HENRY V. to the crown itself, arose from the marriages of different branches of their royal family with different powerful heiresses. (*f*) The union of the two kingdoms of Britain ; the aggrandisement of the House of Austria in Flanders ; (*g*) and the resumption of many of the greatest fiefs by the crown of France, (*h*) by

(*f*) As the marriage of Henry II. with Eleanor of Guienne ; of Geoffry with Constance of Bretagne ; of Edward II. with Isabel, and a variety of others.

(*g*) By the marriage of Maximilian with the heiress of Burgundy.

(*h*) Particularly by the marriage of Charles VIII. with Anne of Bretagne.

which

which alone it was rendered truly formidable, all flowed from the same source.

The little kingdom of *Navarre* discovers to us many of these revolutions. At one time it stood single among the states of the world; at another, it was annexed to France in the person of LEWIS HUTIN, by the marriage of its heiress with his father. Upon the failure of his male issue, it was agreed by *Treaty*, that the right to it should remain as it were in abeyance, till it was seen whether his successors, PHILIP and CHARLES, should have sons; which contingency not happening, it passed, several years afterwards, into the family of *Evreux*, the head of which had married the heiress, and was held with the county of *Evreux* for many years. It afterwards passed again, by one marriage, into the family of *Albret*, (the county being separated from it,) and thence, by another, into that of Bourbon, by which it became again united to the crown of France.

In *Germany*, the single duchy of *Austria* extended itself into an immense dominion, by

the acquisition of Spain, Bohemia, and Hungary. (i) In *Spain*, twelve independent communities coalesced into one. In *Italy*, a variety of states augmented the power of others, as the fortune of the houses of *Sua-bia*, of *Anjou*, of *Arragon*, or of *France*, could prevail ; and all these revolutions, and the *legitimate* assertion of rights and claims, which arose, in consequence, among the powers of Europe, sprang solely or chiefly from the prevalency of this part of their Law of Nations.

The kingdom of France alone, by the wisdom of the Salic law, escaped dismemberment ; and it is really wonderful to consider how much this mode of alienating dominion operated upon the politics and interests of the world, the leading features of which were almost entirely formed by it. The long wars of France and England, the perpetual jealousies of the Houses of Austria and Bourbon, and the great quarrel for Naples and

(i) Puffend. Introd. à l'hist. 5. 251, 423, 424.

Sicily,

Sicily, which so long divided the southern nations, may be absolutely traced to it. (j)

But when marriage was thus made the instrument of changes so immense in the *Jus Publicum* of Europe, we may suppose that there were a variety of points to regulate, before they were allowed to take place. The numerous contingencies to which they might give birth; the diversity of claims which many Powers might have, if left unsettled; the difficulties which the municipal laws of a state might throw in the way of the law of nature; all these it was necessary to arrange, before steps of such importance could be taken: it could not be left to chance, or to verbal agreements, or to uncertain customs;

(j) By the marriage of the Emperor Henry VI. with the heiress of the Norman family, in the twelfth century, those latter kingdoms passed into that of Suabia; by which, says Voltaire, twenty provinces were subjected to Sovereigns, whom nature had placed three hundred leagues off them, and whose quarrels in support of them prove the wisdom of the Salic law. From the house of *Suabia* they passed into that of *Aragon*, whence may be derived the foundation of all the wars between Ferdinand the Catholic, and Lewis XII. Charles V. and Francis I. and partly therefore of the hatred which has perpetually subsisted since between the French and Spanish nations.

and this arrangement, therefore, it was the peculiar business of *Treaties* and *Conventions* to form. "Quum in dubium venit," (says the treaty of marriage between John of England and the eldest daughter of Humbert Count of Savoy,) "quod a memoria recedit, "repertum est in rei gestæ testimonium, per-
"hennis rescripti remedium." (k)

The Treaty goes on to vest in JOHN the whole of the Count's territories, in case no son is born of the marriage; but if there is a son, it vests them in *him*, and gives to JOHN only the county of *Rouffillon*. If the eldest daughter dies before marriage, John is bound to espouse the second; and if he marries the eldest, the second is not to be betrothed without the consent of his father, HENRY II. until the first marriage has been consummated. The Treaty is ratified and signed by forty-nine nobles on the part of the Count, who swear that in case he recedes from it, they will, either with or without summons, surrender themselves as hostages to the king of England.

(k) Rymer's Fæd. i. 33.

The preamble to the treaty of marriage between WILLIAM king of Sicily, and Jane, daughter of the same king Henry, in 1178, sets forth that the former is urged to it from the conviction of the great bond of union *marriage* is calculated to produce between men. "Rerum fœdus et concordiam, humanarum, inter cetera pacis bona, ligat fortius et astringit, vinculum conjugale," &c. (l)

In 1193, the marriage of Philip, son of Baldwin Count of *Flanders*, with the daughter of Peter Count of *Nevers*, was made the instrument of the peace between those two sovereigns, *and of the transfer of the territories that had been the cause of their contest*. If Philip died before consummation, the treaty for the dowry was still to continue; and Henry, another son of Baldwin, was to marry the lady. (m)

In 1210, John king of *England* wishing to form an alliance with Alexander of Scotland, agrees to give him his eldest sister, *Jane*, in

(l) Rymer's Fœd. i. 92.

(m) Pierre Oudergueft. ch. 191. ap. Rec. des Traités. i. 36.

marriage, by a particular time; and in case he is not able to do that, (she being detained abroad) he binds himself to give his youngest sister, *Isabel*, within fifteen days after the expiration of the time. (n)

In 1493, CHARLES VIII. of *France*, wishing to unite *Britanny* effectually to the crown, resolved to marry the heiress of its last duke Francis, which, partly by means of his success in war, and partly through the influence he had with her chief counsellors, he effected. It is remarkable that both himself and the young dutchess were already betrothed to others; CHARLES to MARGARET, daughter of MAXIMILIAN; and ANN, to MAXIMILIAN himself. Nevertheless, those difficulties were got over: *Margaret* was absolutely sent back; and her portion, which, according to the *treaty*, would have vested in CHARLES several important places in *Artois*, was returned, after she had continued ten years at the court of France for education. (o)

(n) Rymer. i. 240.

(o) Commynes. L. 7. Ch. 4.

In these examples, (and more are not quoted from their known multiplicity all over Europe,) we see of what importance the marriage of *sovereigns* had grown to be, both as the means of transferring dominion, and the instrument of forming alliances between powers who had many natural causes for variance and hostility. We are bound also to remark upon the unfortunate situation of the Great, who were thus reduced to a dependency upon political contingencies, and deprived of almost all chance of judging for themselves, in a matter the most solemn, and the most important, to their happiness or misery; who were absolutely treated like merchandise, and chosen or rejected, as the inclination of interest decided. (p)

Stipu-

(p) What reader but must be indignant at the indelicacy of the following article of a marriage treaty: "Quod cum Margareta ad tempus nubile pervenerit, et Gerardus filius comitis, eam carnaliter cognoverit; dux, de bonis suis assignabit," &c. &c. (Chr. Butkens, Preuves. de Brab. &c. p. 58.)

Or the following, between Philip king of the Romans, and a duke of Brabant, Feb. 9, 1207: "Et si contingat filiam domini regis mori, antequam fiat carnalis conjunctio inter eam et ipsum filium ducis Brabantiae; dominus rex
" loco

Stipulations by *Treaty* were made, not only for the celebration, but also for the prevention of particular marriages, when they might be prejudicial to the interests of the contracting parties. Thus, in 1355, in consideration of certain advantages, *Amé VI.* count of Savoy, agreed to deliver up *Jane*, the daughter of the duke of *Burgundy*, to John king of France, upon the proviso *that she should never be married to the dauphin of Vienna*, whose neighbourhood, in that case, would have been rendered too powerful for the house of Savoy. (q)

With respect to the form of these *Treaties*, there was no general one prescribed ; but the

“ loco illius, dabit aliam de filiabus suis, prædicto filio
 “ ducis in matrimonio, si quam tunc habuerit liberam et
 “ absolutam : si autem contigerit mori filiam ducis Brabantiae, similiter, ante carnalem commixtionem, si ipse
 “ dux Brabantiae tunc alium filium habuerit, prædicta
 “ filia domini regis, vel alia, si quam habuerit, illi filio
 “ ducis Brabantiae, matrimonialiter copulabitur.” (Chr. Butkens. Preuves des Troph. de Brab. 59.) The true though coarse picture of manners which these *Treaties* set before us, will excuse the length of the note.

(q) Hist. General de Sav. Preuves. 188.

parties

parties concerned followed the rules of their municipal constitution, and registered them in their chanceries, or caused them to be ratified by their states, according as the nature of their government directed. It seemed, however, on all hands agreed, that no *Treaty of Marriage* was absolutely binding until the ceremony had taken place, either in person, or *by proxy*; or, as was held by some, till the marriage itself was actually consummated.

As the princes of the world could not visit, nor travel through one another's dominions, with the same ease as private persons, the custom of espousing by *proxy* was fallen upon; by which some person, high in the confidence of the future husband, was sent to the residence of the lady, and went through the ceremony with her at the altar, in the name of his master. Of this we have examples, at least as far back as the eleventh century, when in the year 1067, *Alphonso* king of *Leon*, is said to have married a daughter of William the Conqueror by *proxy*. (r)

(r) Mod. Un. Hist. 17. 209.

The necessity for consummation was pleaded (and with success) by CHARLES VIII. when he obtained the heiress of Brittany from MAXIMILIAN, who had not only been betrothed to her, but had actually espoused her by *proxy*. It was urged to the dutchess by the agents of Charles, that her marriage had been celebrated without the consent of her liege Lord; "which defect," they said, (though it would not evacuate a marriage after *cobabitation* and *actual consummation*, yet it) was enough to make void a mere *contract*." (s) This reasoning was afterwards set forth in a regular *deed*, or *state memoir*, in which it is expressly laid down, that the marriage being "*projeté, mais non consommé, demeura nul*," (t)

MAXIMILIAN on that occasion began a ceremony, which till then had not been generally known. "The marriage," says Lord Bacon, "was consummated by *proxy*, with "a ceremony *at that time in these parts new*; "for she was not only publickly *contracted*, "but *stated* as a Bride, and solemnly bedded;

(s) Bacon. Hen. VII. 48.

(t) Amelot. de la Houffaye. ap Fred. Leonard. I. 418.

“ and after she was laid, there came in Maxi-
 “ milian’s ambaffador with *letters of procura-*
 “ *tion*, and, in the prefence of fundry noble
 “ perfonages, men and women, put his leg
 “ (ftripd naked to his knee) between the
 “ efpoufal fheets, to the end that that cere-
 “ mony might be thought to amount to a *con-*
 “ *summation*.” (u) As Maximilian, however,
 was almoft in the neighbourhood of his Bride,
 it got him (and not undeservedly) the reputa-
 tion of a “ cold wooer,” and at all events was
 the caufe, as we have fhewn, of the ruptute of
 his marriage. (v)

As the laws which governed the marriages
 of the princes of Europe were thus of the ut-
 moft confequence to the ftate of their poli-
 tics, fo alfo muft have been the laws which
 governed the rupture of thofe marriages; and
 this, as there was no common court to decide
 between fovereigns, muft have been a matter

(u) Bacon. Hen. VII.

(v) “ They faid, (*the friends of Ch. VIII.*) that it was
 “ an argument that Maximilian was a *widower*, and a *cold*
 “ *wooer*, that could content himfelf to be a bridegroom by
 “ *deputy*, and would not make a little journey to put all out
 “ of queftion.”—Id. 49.

of

of considerable nicety. The proceedings, however, upon it, were comparatively regular, and add to the proofs of our point, that the laws of the nations of Europe were peculiar to themselves, and dependent upon their particular system.

We have seen in a former chapter (*w*) that the Pope claimed to himself the jurisdiction of matrimonial causes, as falling peculiarly under ecclesiastical law; and it were endless to recite the vast variety of cases in which he took cognizance of *divorces*, either on account of the marriage having been contracted within forbidden degrees, or from other causes.

Towards the middle of the fourteenth century, however, when the empire was declared independent of the Pope, this jurisdiction was shared with him by the Emperor, at least as far as the vassals of the empire were concerned. In the Codex Diplomaticus of *Leibnitz*, there is a long and formal *Letter of Divorce*, awarded by LEWIS of BAVARIA, to MARGARET dutchess of *Carinthia*, and JOHN, a son of

(*w*) Chap. XIII.

Babemia,

Bohemia, which professes to proceed upon the principles of the *divine law*, as explained by the most approved doctors. The cause for divorce was *impotency*; and the letter recites, that the Emperor had examined the matter with the utmost attention, both of himself, and by his agents, according to the desire of the parties; and discovering that the duchess was still a virgin, and the defects of her husband natural and incurable, he pronounces (*legi divinæ conformiter, sicuti certum est, et asserunt sacræ scripturæ, siue leges divinæ, atque civilis sententiæ sufficientes, ac comprobati doctores*;) that both of them shall for ever be divorced from all bond of matrimony, and be allowed to dispose of themselves, that is, their proper persons, and all their goods, rights, and things, as well moveable as immoveable, as either shall think fit. (x)

The marriage, thus annulled, might have united the kingdom of *Bohemia*, and the duchy of *Carinthia*, under one head: it was prevented by the sentence of divorce; and Margaret immediately afterwards bestowed her-

(x) Leibnitz. Cod. Diplom. 154.

self, by virtue of that sentence, upon Lewis, Margrave of Brandenburg. (y) Such then were some of the governing principles of those laws, upon which the state of Sovereignty in Europe, was made in a great measure to depend. (z)

OF TREATIES OF SALE.

A SECOND instrument of the alienation of dominion, was the regular and obvious one of *Sale*, or *Exchange*, so frequent in the private affairs of the world.

With respect to this however, there were many difficulties, which the municipal constitutions of the different States must have naturally thrown in the way. For though

(y) Leibnitz Cod. Diplom. 154.

(z) Upon the subject of *Divorces*, the reader will recollect the advice given by Cranmer to Hen. VIII. to consult the Universities of Europe, with respect to the *Divorce* which the Pope refused to pronounce. A corroborative proof of the union peculiar to the nations of that quarter of the globe.

after the institution of property, every man who possessed the soil, might barter his interest therein to another for a valuable consideration; yet that institution could not extend itself over the rights of a free people. The government therefore of a particular person or family, which a free body of men might have erected, could not be transferred at pleasure by that family to another: The consent of the persons to be governed, was necessary before the transfer could regularly take place.

Such Sale or Exchange however might legitimately be effected in States, the constitution of which considered them as the absolute property of the reigning family, and whose subjects were therefore in the nature of serfs, chained to the soil, and with the soil, liable to be sold at will.

The great luminary of the Law of Nations, has carried the rights of particular families over their subjects pretty far, in his account of what he calls *patrimonial kingdoms*, which he considers in the light of absolute pro-

perty. (a) Whether his account of that matter be well or ill founded, it is not here the place to enquire; since however the true spirit of philosophical liberty, may have recalled men from the blind submission which they formerly yielded to the despotism of one man, or one family; it is certain that the fact has sometimes existed; and the Despot therefore who received such submission, enjoyed it, or sold, or bartered it away, like any other property which he possessed.

There are, however, few examples of the sale of the rights of *Sovereignty* in the greater countries of Europe, the Constitutions of which were remarkably free; and they are confined chiefly to those smaller provinces, which in some measure resembled the private estate of the Sovereign.

In 1301 Theodorie Landgrave of Thuringia, sold the Marquisate of Lusatia to Burchard, Archbishop of Magdebourg, for six hundred marks of silver with all its Inhabitants.—
“*Insuper cum ministerialibus, Vasallis &*

(a) Grotius *de B. et P. L.* 3. ch. 11. 4. Sec. 12. 21.

" Mancipiis, et aliis hominibus cujuscunque
 " conditionis in jam dicta terra commoranti-
 " bus," &c. (b) In the same manner in 1311,
Dantzick, Derschovia, and Swieca, were sold
 by the Margrave of Brandenburg to the
 Grand Master of the Teutonic Order, for
 10,000 marks, " cum castris, castellis, vellis,
 " Monetis, Teloneis, foris, cum Agris, cultis
 " et incultis, viis et inviis, pascuis, sylvis, ne-
 " moribus, lacubis, paludibus, venationibus,
 " piscationibus, borris, melleficiis cum omni
 " utilitate et fructibus." (c)

In 1333, the city and territory of Mecklin,
 were sold by a regular *Treaty of Sale*, be-
 tween the Bishop of Liege its Sovereign, and
 the Earl of Flanders, for 100,000 reals of
 gold and fealty reserved. (d) About the same
 time, the city and county of *Lucques*, were
 sold by John of Luxemburg, king of *Bohe-*
mia, to Philip of *Valois*, for 180,000 flo-
 rins; (e) and several years afterwards, the
sovereignty of Frankenstein, was sold by the

(b) Du Mont. i. 330.

(c) Id. i. 365.

(d) Preuves des Troph. de Brab. ap. du Mont. i. 164.

(e) Du Puy. Droits du Roi F. C. sur plus. Etats, &c.
p. 70.

Duke of *Silesia*, to the King of *Bohemia* for 2000 marks. (f) The possession of Avignon by the Popes, so celebrated formerly, and which lasted till our present days, was originally owing to a similar deed of sale; CLEMENT VI. having *bought it of JANE Queen of Naples*, and *Countess of Provence*, for 80,000 florins. (g)

The full interest also, which gave men a title to sell their dominions outright, was attended with the consequent title to *mortgage* the temporary enjoyment of them; and this was the case with ROBERT duke of *Normandy*, whose religious and military ardour for the first *Crusade* being repressed for want of money, (no *newes*, says Speed *to his coffers*) he was induced to mortgage his Dutchy for 6,666 pounds weight of silver, to his brother William, and gave him possession of it before his departure. (b)

The power of selling while in actual possession, conferred at the same time, the right to

(f) Du Mont. Corps. Dip. 2. 155.

(g) Leibn. Cod. Dip. 200.

(b) Speed. 441.

fell the reversion. In 1479, LEWIS XI. whose eye had been long fixed upon the annexation of *Britanny* to the crown of France, upon default of male offspring in Francis II. bought the rights of the house of *Penthievre*, the next male heirs in reversion; (i) and fifteen years later, his successor CHARLES VIII. purchased the *right* to the whole Empire of *Constantinople*. The famous BAJAZET, had long been in possession of this illustrious remnant of the Roman power; but ANDREW PALEOLOGUS, the nephew of the last Christian Emperor CONSTANTINE, was considered by the Christians as the rightful heir to the throne. This prince, who lived in exile in *Italy*, and knew the chimerical views of the King of *France*; scrupled not to part with an imaginary title for a real possession. He therefore entered into a regular *Treaty of Sale* with the Cardinal De *Gurk*, by which he parted with all his right and title to the Imperial crown in favour of CHARLES, upon the following conditions: That the King should assign him an annual pension of 4300 ducats, and an estate in lands, either in *France* or

(i) Garnier. I. 494

Italy of 5000; that he should give him the command of one hundred men at arms; use his good offices with the Pope to continue his pension of 8000 ducats; and establish him, after the conquest of the Empire by Charles, in the despotism of the Morea; for which he, *Paleologus*, was to send him annually to *Constantinople* a white horse by way of homage. (k) This Convention was drawn up by two *Notaries*, and ratified by the King, who in consequence of this purchase, appeared at his Coronation at *Naples*, cloathed in the ornaments of the Imperial dignity, and made no scruple of professing his design to proceed against *Constantinople*, fortified with the double title, with which the common rights of Christians against Turks, and the purchased rights of *Paleologus*, would thus invest him. (l) The whole purchase and the consequent conduct of Charles, are instances of the Law of Nations, singularly operated upon, by *Treaty* and *Convention*.

To this head (on account of the similarity of the principle which governed it,) I might

(k) Garnier. 2. 429.

(l) Id. 461.

also refer the custom of alienating dominion and sovereignty, by BEQUEST, and by actual DEED of Gift. Instances of the first must be frequent in the reader's recollection, and the same power which could dispose of the whole *Sovereignty*, had almost of course the right of altering the succession. Thus CHARLES II. king of *Sicily*, and Count of *Provence*, in 1308, ordained by will, that the male heir, though farther removed, should succeed to the *County*, before the female, though nearer to the common stock. (m) Adoptions also, which sometimes conferred very important rights, and gave birth to considerable revolutions, took their origin from the same source. The claims of CHARLES VIII. upon Naples in the fifteenth century, and the celebrated invasion of that country in consequence of them, were ultimately founded upon the *Adoption* of Lewis, Duke of Anjou, by JANE I. Queen of *Naples*, in 1380; and the rights conferred by this adoption were, as might be supposed, laid before all Europe by a solemn and public *Deed*. (n)

Of *Deeds of Gift* there is a remarkable case

(m) Leibnitz. Cod. Dip. 51. (n) See Leibnitz. 237.

in the history of *Dauphiny*. That province had become an independent State in the confusions which took place after Charlemagne. In consequence of the then allowed rights to create Kings, the Emperor, LEWIS V. in the fourteenth century, created the Dauphin *Humbert, King of the kingdom of Vienna*; to which he added the singular privilege of disposing of his sovereignty at will, whether during life, or after his death. It was by virtue of this constitution, according to the writers on the *Droit Public*, that Humbert, in 1343, ceded his dominions to Philip of VALOIS, by a solemn *Deed of Gift*. (o) By a similar Deed, and upon a like principle, the Emperor Henry VI. had invested Richard I. of *England*, with the antient kingdom of *Arles*; and Baldwin, Emperor of the *East*, imitating this illustrious prerogative, conferred upon the Duke of *Burgundy*, in 1265, the kingdom of *Theffalonica*. (p)

OF

(o) Pfeffel. *Droit. pub. d'Allemagne*. 1. 541. Henault. *Hist. Chron.* 1. 315. there were three Treaties concerning this transaction; one in 1343; one in 1344; and the final one in 1349. Humbert retired into a Convent. The Deeds are in Leibnitz. *Cod. Dip.* 158.

(p) He conferred it "considerant et veant le bien, l'oner,
 "le profit, et l'avancement qu'on peut venir en l'Empire
 "de

OF TREATIES OF PROTECTION,

IT was also by *Treaties* and positive *Conventions*, that particular States vested in others, certain high powers, which gave them considerable privileges with respect to the parts they were to act among other States, though it did not altogether destroy their own Independence, or take from them the possession of their internal government. This was what was called an UNEQUAL ALLIANCE, by which a smaller State often parted with the height of its Sovereignty, to some one more powerful, in exchange for the protection and consequence which it might derive from the name and strength of the other. In this case, the greater State took upon itself the charge of defending the smaller, and acquired in return a right of interference in its political affairs, and hence another *legitimate* cause for action upon the

"de Romanie, dou noble Baron Hugue duc de Bourgoigne." Perard. Rec. des pieces curieuses. serv. à l'Hist. de Bourg. 508. For other cases see Du Mont. i. 288, 337, 362. Recueil des Traitez. i. 171, 185, 430, 583, &c. Leibnitz. 220, 382.

theatre

theatre of Europe. Of this we have an example, in the short, but clear and precise terms of the convention between John, King of England, and the King of Man, in 1205, preserved in Rymer. It runs thus; "Rex, &c. omnibus, &c. Sciatis, quod suscepimus dilectum consanguineum nostrum, Reginaldum regem Manniæ, in custodiam, protectionem, et defensionem nostram, et omnes terras, et homines suos. Et prohibemus ne quis ei, vel suis, inferat injuriam, vel gravamen; quia si quid ei forisfactum fuerit, id nobis factum putabimus." (9)

Of this sort also may be considered all those Deeds by which many subordinate States acknowledged others to be their superiour lords according to the feudal rights, and voluntarily did them homage, and swore fealty, although originally they might have been independent of their power. The same King of Man, who was received into the protection of the King of England in 1205, became in 1262, his absolute *vassal* and liege man, by a

(9). Rymer, 1. 137. See also a similar Convention with the King of Connaught, Id. 1. 189.

special Convention, the production of which was to testify it to all the world. (r) The well-known subordination in which the Republic of *Genoa* from old times existed with respect to France, may be attributed to the same source. There had been many pretensions in the former Crown to the *Sovereignty* of that State, owing to a voluntary surrender of it, which in 1458, were all solemnly confirmed, by a deputation for that purpose to CHARLES VII. who received the oaths of fidelity from the Doge and the Senate; established the Duke of *Calabria* his Governour, and took possession of the citadel; in return for which, according to the *Treaty*, he undertook to defend them from the attempts of Alphonso King of Arragon. (s) In consequence of this unequal alliance between the States, the Kings of France had a constant *legitimate* pretext for interfering in the affairs of *Italy*, as far at least as the State of *Genoa* was concerned.

(r) Omnibus Christi fidelibus, &c. Reginaldus, rex Insularum, &c. Sciatis, quod deveni homo legius, Domini Regis Johannis, &c. Et in hujus rei testimonium hanc cartam meam, inde feci. Id. i. 159.

(s) Villaret, 4. 336.

To

To the same part of the law before us may also be attributed, the *Sovereignty of Elizabeth of England*, as protectress of the *Dutch Common Wealth*; in which character she possessed a permanent seat in the Council of State; was at the head of the military force of the Republic; and without any cause for war, or any natural connection with other powers, became as an auxiliary of the *Dutch*, engaged in the capacities of friend or enemy, with almost all the world. (t)

OF DEEDS OF RENUNCIATION.

BUT as the rules by which Sovereignty and dominion were alienated among the nations observing such customs, made these new rights appear an innovation upon the old; it became necessary, for the arrangement of future claims, that alienations should be as public among them all, and as clearly expressed as possible. In addition therefore to the solemn deeds, by which the articles of

(t) Camden. ad. an. 1585.

agreement

agreement were exhibited ; there were other deeds often drawn up, which were a kind of ratification of the first, and by which a public *Renunciation* was made, not only for the party concerned, but also for his posterity, of all those rights which were bartered away.

The custom of *renouncing* by solemn Convention, pretensions which might otherwise have been asserted, is very antient in Europe ; and was wisely adopted by the Law of Nations, as a proper mode of settling distant claims, and getting rid of difficulties that might be perpetually embroiling the different States. As the custom of appeal to one another by manifesto and memorial had now grown pretty universal, and the treaties that were made, were *matters of record* ; these treaties of *Renunciation*, and the publication of them to all the world, became, it was supposed, a sufficient deposit of future arrangements. They were thus preserved, as it were, in the *Chancery* of Europe, (u) and the various nations

(u) The common address of these Treaties was, *Omnibus Christi fidelibus, &c.* or *ad universitatis vestræ notitiam volumus pervenire quod. &c.* or, *noverit Universitas vestra.* Rymer. Du Mont. & Leibnitz. passim.

looked to them, as to one of the bases of their political conduct, and the guide of their legitimate claims. The security it must be owned, was not of the strongest, and *power* did not fail to break it down but too frequently. It was however the only one which the independence of States could admit of; whenever justice prevailed over strength, it was of sufficient force; and wherever it failed, the power of the most regular tribunal would possibly not long have resisted.

In the proceedings concerning the succession of France and Navarre in the fourteenth century, we have a full example of *Renunciation*. In the year 1316 Lewis X. King of France and Navarre died, leaving but one child, the Princess *Jane*. The constitution of Navarre vested the kingdom immediately in *JANE*; but the succession of France was disputed by the next male heir *PHILIP V.* At that time the Salic law concerning the succession, was not so well understood, and the Duke of *Burgundy*, the guardian and next of kin to the Princess, raised a considerable party against *Philip*, in which he was joined by the latter's own brother, the Count de la Marche.

The

The matter was composed by treaty, a valuable consideration was paid to *Jane* for the rights which she *might* possess over the kingdom of *France*, and which she confessedly had to the kingdom of Navarre, and a regular and solemn *renunciation* of all those rights, was made in her name by the Duke of *Burgundy*. (v) This treaty only extending to Philip and his issue, and that Prince dying without children, a similar one, attended with a similar *renunciation*, was made between Charles IV. and the same Duke. (w)

But one of the most important instances of this sort of custom that occurs in the earlier ages, is to be found in the twelfth article of the TREATY of BRETIGNY, which ended the long wars of Edward III. in support of his claim upon *France*. By that article it was agreed, that two mutual *renunciations* should be made by the families of France and England. King John and his eldest son, were to *renounce* for ever, all claim to jurisdiction

(v) Tresor des Chartres ap. Velly. 4. 315. Leibnitz. Cod. Dipl. 70.

(w) Preuves de l'Hist. d'Evreux. ap eund. 386.

and Sovereignty as Lords Paramount, over all the places ceded by the treaty to Edward; who, in like manner, with the Prince of Wales, was to renounce on his part all rights and title to the crown of France. (x) These conditions were duly executed by the King of France, who sent a formal *Deed of Renunciation* to Bruges, in conformity to his agreement; though, according to the French historians, his example was not followed by Edward. (y)

OF TREATIES OF CONFEDERATION.

IN the last place, *Treaties* produced a change among the sovereignties of Europe, in consequence of the various federal alliances, of which they were the immediate, and indeed the sole instrument.

It was through their means, that the nations of the world were made to understand *in form*,

(x) Rym. 6. 179.

(y) Actes M.S. de l'exec. du Tr. de Bret. Villaret. i. 234.

that

that a new State was introduced among them; and therefore that the members which had coalesced in the alliance, were henceforward to be viewed under a new relation. In this manner therefore a number of small Communities, or Provinces, *being, each of them, Sovereign within themselves,* might unite their Sovereignties, and become one power; and the Confederation thus formed, might through the same instrument, receive within its pale, any other Communities which chose to join it. Even private individuals, (could we suppose any number of them to be found who had not yet entered into society,) might thus by *Convention*, form a body politic; and as it was by the means of *Treaties among one another*, that these leagues were first effected; so also, it was by *Treaties with other States*, that their union was acknowledged to be legitimate.

Of all this we have examples in the ages before us; the most illustrious of which are the confederation of the GERMAN STATES, of the SWISS CANTONS, and of what was called the TEUTONIC HANSE.

It is very true that the first of these, had been for a long time one integral nation, (if I may so term it,) the Sovereignty of which was possessed *undivided* by the King of Germany, who was at the same time by *election* Emperor of the Romans. But it is well known that by degrees, it split into a vast variety of States, all of them sovereign within themselves, though united into one great *Confederation*, with an *elected King* for their head. The basis of this Confederation, is a PUBLIC DEED, known by the name of the GOLDEN BULL; which fixed the exact rights of the different component States, and announced to all the world, the places they were to hold in Europe. From that Deed therefore, explained and enlarged also by numberless important *Treaties*, the *integral* authority of the first kings was known to be divided among a number of inferiour Sovereignties, which all other States were accordingly bound to acknowledge as such, unless they had other particular causes for denying it.

In the same manner it was, that the SWISS CONFEDERATION arose; which however,
as

as is well known, was rather an *Alliance of Confederations*, than one general coalition of all the *Helvetic* States. One of the earliest instruments of union that was entered into by this celebrated and interesting people, (1315) purports to be an alliance almost between the individuals themselves of the contracting Cantons; the Deed running (though collectively) in the name of the *Peasants* only. "A cette cause," says the record, "*Nous les Paysans d'Ury, de Schwitz & d'Underwalden*, faisons a scavoir," &c. (z) In the next alliance, which was with the Canton of *Lucerne*, by the three Cantons already united, (1332) the style is preserved; and the Deed purports still to be made by the *Peasants* above mentioned, though *Lucerne* assumes the dignity of a *State*, under the name of *Advoyer, Conseillers & Bourgeois*, (a) In a third Deed, which took in *Zurich*, (1351) the three original Cantons quit the appellation of *Peasants*, and appear as one *State* in conjunction with *Lucerne*, under the common government of *Advoyer, Conseil, et Bourgeois*. (b) In a fourth alliance, with *Berne*,

(z) Leibnitz, Codex. Dipl. 69.

(a) Id. 141.

(b) Id. 189.

(1353) in which the three first Cantons stand alone, (the State of Lucerne not entering into it,) they return to their original character of *Payfans*. (c)

It is needless to point out to the reader, that it was through the operation of these Treaties, that the *Swiss Peasantry* erected themselves into independent States; and that from the Treaties which were afterwards made with them by other powers, their *Sovereignty* came ultimately to be acknowledged.

But the most remarkable example of a new and powerful State, arising out of the federation of a number of smaller communities by *Treaty*, is to be discovered in the famous Alliance called the HANSEATIC LEAGUE.

The nature of this celebrated Union, develops principles which were unknown before in Europe, and probably in the world; and the whole of its Constitution discovers to

(c) Au nom de Dieu Amen Nous l'Advoyer et les Bourgeois de la ville de *Berne* en desert, et les Amans et *Payfans* d'Uri, &c. scavoir faifans, &c. (Id. 196) For a summary of the Swiss Alliances see Heifs. 2. ch. 27.

us a refinement which was attended with such important consequences, that it is wonderful that Sovereigns could have suffered it to exist.

The association was, if I may so call it, *artificial*. It exercised the rights of *Sovereignty*, and for a long time took its rank among the States of the world, though composed of members, which were so far from being independent themselves, as actually to form subordinate parts of other Empires. A few of the cities were indeed free and Imperial; but Hamburgh itself, the richest and most important of them all, had been entirely dependent upon the dutchy of Holstein; and even long after it had *bought* its liberty of Denmark in 1225, it was allowed no seat in the *Diet*, and of course could not be considered as a State of the Empire. (*d*)

This well known League was originally formed for mere commercial purposes; (*e*) and

(*d*) Pfeffel. Droit. pub. d'Allemagne, 1. 378.

(*e*) See the account of the various privileges granted to them by different Sovereigns. Werdenhagen. De Rep. Hans, c. 15.

the immediate object which brought them together, was the defence of their trade from the Pirates that infested the Baltic. The accomplishment of this important end, and the long succession of wise measures which were afterwards pursued, contributed so evidently to their prosperity, that they received almost daily accessions to their alliance in all the principal trading cities of Europe. Exclusive of the cities of HAMBURGH, LUBEC, and BREMEN, (which as they were the founders, so they are now the only remnant of this famous Association,) Places the most remote, and the most important, in various countries of Europe, joined interests with, and were received among them. Eighty of the most powerful cities of Germany, formed the basis of the alliance; *France* furnished it with *Rouen*, *St. Malo*, *Bourdeaux*, *Bayonne*, and *Marseilles*; *Spain*, with *Barcelona*, *Seville*, and *Cadiz*; the *Low Countries*, with *Antwerp*, *Dort*, *Amsterdam*, *Bruges*, *Rotterdam*, *Ostend* and *Dunkirk*; *Italy*, with *Leghorn*, *Messina*, and *Naples*; *Portugal*, with *Lisbon*; and *England*, with *LONDON*. (f) Thus, the

(f) Heiss. Hist. de l'Empire, 2. 343.

most opulent of the Union, were *finely* under the control of various powerful Sovereigns, though taken *collectively*, they formed an extensive and *independent* State.

A power so immense as this Confederation could have supplied, would have been by far the most formidable maritime force which the world had known, had not the rights of others, so evidently interfered with almost every one of its *individual* members. Notwithstanding this however, and the definition of it that has been given by the author of the *Coutumes de la Mer*, (which confines it to a mere "*participation of privileges, granted by several Kings and States*;" (g) it carried its views far beyond the bounds of *Commerce*, and flourished as a *Sovereign Power*, or at least *exercised Sovereign Rights*, till the middle of the fifteenth century, with considerable strength and vigour.

From what has been stated concerning the *dependency* of the component parts of this Alliance, and the annihilation to which it

(g) *Coutumes de la Mer*. 180.

was almost momentarily subject, according as the policy, or even the caprice of other Sovereigns might determine; it may appear inaccurate to have mentioned this Confederation as a *State*. It has indeed been asserted in form, by an author of the last century, that it was merely such an Alliance, as many Commercial Companies have exhibited since; that it never constituted a *Republic*, or *State*; and could only be considered as a *Society of Merchants*, not of *Sovereigns*; (*b*) as a proof of which, if the Treaties they have made with *France*, and *England*, are examined, they will be found, he observes, to relate solely to the confirmation and renewal of certain privileges and immunities. (*i*)

(*b*) Pour dire ce qui en est, la Hanse Teutonique n'a jamais fait un *Etat*, ni une *Republique*;—ne pouvoit être considéré que comme une *Société de Marchands*; ou tout au plus que comme les *Compagnies* qui se sont formées pour les deux Indes dans les *Provinces Unies*.—Etant composée de villes, qui étoient la plupart *municipales*, et qui n'avoient point de marques de *Souveraineté* du tout, mais dépendoient de Princes qui les gouvernoient comme leurs autres Sujets; elles ne pouvoient faire entre elles qu'une *Société de Marchands*, et non une *Alliance de Souverain à Souverain*.

Wicquefort, de l'Ambassad. L. 1. S. 2.

(*i*) Wicquefort de l'Ambassad. Ib.

This

This is the opinion of *Abraham Wicquefort*, and the purpose of his assertions, and his reasoning, is to shew, that not being *Sovereigns*, they had no right to send Ambassadors. The case which gave occasion to his enquiry, was simply, whether the words *Ambassador Deputies*, which described some of their agents in their credentials, gave them absolutely the character of *Ambassadors*; and it was determined by the Court of France, where the question arose, (1645) that they did not. It does not however apply to the point in question, and I have mentioned it merely in order that we may examine a little, this position of *Wicquefort*,

We have already mentioned, that the Constitution of the Hanseatic League was a remarkable one. It was so much so, that were it abstracted from a number of strong facts in their history, we should not hesitate to agree with *Wicquefort*. Those facts however, so completely, and so frequently denounce the actions of *Sovereigns*; and passed off so entirely without contestation upon that ground; that a very cursory view of them must oblige us to admit, that if they actually
were

were not *Sovereigns*, they were at least *in the daily exercise of all the rights of Sovereignty*.

In 1361, war breaking out between Sweden and Denmark; WALDEMAR III. King of the latter country, made a descent in the Island of Gothland, and plundered the rich city of *Wisbuy*. As some of the Hanse Merchants were involved in the ruin, (as it should seem without redress,) the *League* in revenge, *confiscated* all the ships and effects of the *Danes*, that were within their ports, and declared war *in form* upon the King. (k) Into this war they drew *by alliance*, the King of *Norway*, the Dukes of *Mecklenburgh* and *Holstein*, and several other Princes. And after various success, and a short peace, the war broke out again; and was resolved upon, *after a solemn deliberation held by the deputies of eighty of the cities, who met in Congress for that purpose in Cologne*. (l) In consequence of this,

(k) Commovit ea Gothlandiæ devastatio omnes Germaniæ Civitates, præsertim illas septuaginta Capitales, quæ, missis legatis, hostilia VALDEMARO, ob direpte eorum insigni Emporium *Visbycense*, nuntiabant.

Olaus Mag. Lib. 18. p. 691.

(l) Mbd. Un. Hist. 29. 102.

they

they equipped a formidable fleet, which sailed straight to *Copenhagen*, and obliged the King to make a peace, and yield to them the island of *Schonen* for sixteen years, by way of reimbursement. (m) The Treaty was sworn to, and guaranteed by a number of Princes. (n)

In the fifteenth century, we see them engaged in much more important, though less successful operations; in which the rule of their conduct seems to have been founded, not so much upon *commercial*, as *political* principles.

The Kings of *Denmark*, had long been the *Despots* of the *North*, and the great bulwark between them and the *Vandalian* cities, (as the *Teutonic Hanse* were sometimes called) was the Dutchy of *Holstein*. *ERIC* of *Denmark*, having nearly overwhelmed the Princes of that Country, the City of *Hamburg* represented to the League, the importance of opposing his progress, and the necessity of holding the balance between them. In con-

(m) Heifs, 2. 343.

(n) Mod. Un. Hist. 29. 203.

sequence of this they allied themselves with Holstein, but first sent Deputies to ERIC, who in the name of *all the Hanse*, exhorted him to peace; which being refused, they once more exercised *the sovereign right of declaring war.* (o)

In the course of this war, they sent a fleet against *Denmark*, composed of more than two hundred ships, having twelve thousand land forces on board; (p) and the *Emperor*, who was the ally of *Eric*, having it in his power to put them under the Ban of the Empire; they published a manifesto setting forth that they had *declared war* in defence of their rights and liberties,

Hostilities were at length put an end to, *after having lasted nine years*; and the peace was agreed upon in a regular *Congress*, at which the Deputies of the *Hanse* attended, as the *Allies of Holstein*, (q)

Now I own, that in these operations, I can see nothing but the conduct of the most

(o) Mod. Un. Hist. 244.

(p) Heiss. 2. 343.

(q) Mod. Un. Hist. 29. 148. 155.

regular *Sovereign Power*; and there is no alternative but to pronounce the *Hanseatic League* to have been either *Sovereigns* or *Freebooters*. The manner in which they conducted themselves, however, is decidedly in favour of the first; since *Declarations of War*; *Treaties of Peace*; *Manifestoes*; *Alliances* with Princes, and the *Guaranty* of *legitimate Sovereigns*, can hardly be entered into, except by those who are *legitimate Sovereigns* themselves.

There were many other transactions, of a nature indeed not so decided, but which all of them in like manner take their rise from a supposed *Sovereignty* in the league; and by the fifteenth and twenty-first articles of the ordinances agreed upon in their assembly held at *Lubec* in 1418, they exercise the power of corporal punishment, of imprisonment, and even of life and death. (r)

Thus

(r) "Nemo arma, tela, aut instrumenta bellica, &c. "piratis, prædonibus, homicidis, et talibus malitiosis vendito, sub pœna vitæ." Leibnitz. Cod. Diplom. 313. If any of a ship's crew also refused, when in distress, to assist in

Thus much then for the more prominent acts of *Sovereignty* exercised by the Hanse. But if we also inspect the *Treaties* alluded to by Wiquefort himself, we shall find the style of them very different from the style of subordinate contracts, or *mere charters*, which must have been used, had they been simply, as he supposes, a *Gild*, or *Fraternity*, (and nothing more) stipulating for commercial privileges.

In the first place, though the immediate subject matter of the *Treaties* is, as we may naturally imagine, concerning *commerce*, yet the language of the contracting parties is that of *Sovereigns*. The characters of the agents on both sides who made the *Treaties*, are described in terms exactly similar; and the powers with which they were invested, relate to things in which *Sovereigns alone* are allowed to interfere; in addition to which, the very titles

in preserving the cargo, so that it came to be damaged through their negligence,

Tunc, nebulones captivi et in carcerem adduci debent, in quacunque civitate illi deprehendi poterunt; atque tunc per integros quatuordecim dies, non aliter quam aqua et solo pane saturentur; saltem ad necessitatem vitæ sustentando, ut in honestate fidelitas eo rectius conservitur. (Ibid.)

titles of the deeds import them to be, what none but *Sovereigns* can have the power to make, namely, *Treaties of Peace*.

As a proof of this, we need only set forth the language of the *Treaty of Utrecht*, made between *Edward IV.* and the *League*, Feb. 29, 1474.

It is called a *Treaty of Peace* between the King of *England* and the *Hanse Towns*, (s) and the Plenipotentiaries who made it are thus described: W. Hattecliffe, &c. Joannes Ruffel, &c. W. Rosse, &c. *Oratores, Commissarii, Procuratores, Nuncii, et Deputati nostri*, in civitate *Trajectensi* comparuissent; tuncque et ibidem, cum *spectabilibus et circumspectis viris, Domino, &c. &c. &c. Communitatum, Civitatum, et Oppidorum, Hansæ Teutonice, Oratoribus, Nunciis, Procuratoribus*, una cum aliis sibi adjunctis, particularium civitatum, &c. *Oratoribus*, infra nominatis, &c.

(s) Aitzema. Aff. d'état et de guerre. 4. 389.

Now upon this we may observe, that the only difference between the titles of the agents of *Edward*, and those of the *League*, is the addition to the former, of *Commissarii* & *Deputati*, which are of little consequence: for it is well known to all those who have looked into antient Treaties, and the credentials of Ambassadors, that the word ORATOR was in old times the descriptive title of the agents of Sovereigns in the exercise of their functions. (t)

The Deed goes on to say, that these *Ora- tores* had met on both sides to deliberate, de modis, viis, ac formis, quibus *differentiæ, lites, guerræ, injuriæ, et discordiæ*, inter homines partium prædictarum, motæ & pendentes, finaliter pacificari, &c. possent.

That, in consequence of this, *inspirante pacis autore*, pro pacificandis et abolendis *differentiis, litibus, guerris*, &c. &c.

Atque pro reducendo, et restituendo, omnes et singulos homines utriusque partis prædictæ,

(t) Vide Coke: 4th Institute. 153:

ad pristinam amicabilem, et mutuam communicationem, et conversationem; liberumque intercursum, mercandifandi, &c. they had agreed upon a certain *Convention*, vice, *autoritate*, et *nominibus superiorum*, pro se suisque *successoribus et subditis, universis, &c. &c.* (v)

This is a language, so clearly that of the agents of *Sovereign Powers*, that if it is allowed (and it has never been denied) that the Hanse Towns had a right to make use of it, I cannot conceive it commonly consistent to deny their *Sovereignty* at the same time. The legitimate mention of *wars, injuries, and discord*; of the *inspiration of Heaven*, as prompting them to peace; and of *successors and subjects*, who were to be bound by the Treaty they were going to make; are all proofs of the point too strong to need any farther comment.

Such, then, is a very short view of this celebrated Association, under a light in which it has not often been considered, and which bespeaks the utmost refinement in those Con-

(v) Vide ut sup.

ventions which permitted such a Sovereignty to exist; for it is certainly no incurious part of the history of the European nations, to observe them acknowledging for so long a time an *artificial* state, composed of materials which almost all of them *lent*, as it were, towards its formation; which they had the power of withdrawing at pleasure; and which, like an enchantment, was actually annihilated as soon as they chose to break the charm. To this they were at last driven by the increasing power of the union, which induced them, after their famous war with *Eric of Denmark*, to withdraw their respective merchants, and the alliance instantly crumbled to-pieces. From that time, none but the *German cities* were allowed a place in the Confederation; and they being continually reduced, as various Sovereigns got the better of them, it has dwindled to the three towns, formerly mentioned, (*w*) which are perhaps more powerful, from their individual consequence, than from any support they may derive from a union, which is now "*the presentation of but what it was.*"

(*w*) Pfeffel. droit pub. d'Allemagne. I. 443, 445.
Putter. 3. ch. 1.

OF AUXILIARY TREATIES.

Another great point in which Treaties and positive Conventions influenced the Law of Nations, and contributed to separate it still farther from the law of nature, was the power which it vested in nations of doing certain acts of a hostile nature, but which were not therefore to place them in the situation of a declared enemy.

According to natural principles, it should seem, that whoever assists an enemy, let what will be his previous connection with him, becomes instantan an enemy also, and may therefore be pursued as such wherever he appears. According to modern doctrines, however, in consequence of the multiplication of the ties between all the States of Europe, by means of *Treaties*; it is allowable for a nation to be the enemy of another to a certain point, and no farther: and if, *previous* to the breaking out of war between two kingdoms, a defensive *Treaty* has been made between one of them and a third, by which a certain num-

ber of troops is to be mutually afforded, the compliance with the agreement implicates the *Auxiliary* in the quarrel, only so far as the contingent which he furnishes is concerned. (x)

Traces of this refinement, and the manner in which it was by degrees introduced by *Convention*, are to be discovered very plainly in the ages before us, particularly in the Treaty between JOHN and PHILIP, Kings of England and France in 1214; in which their conduct with respect to the rival Kings of Sicily and Germany, FREDERICK and OTHO, was laid down in precise terms. PHILIP was the ally of FREDERICK, and JOHN of OTHO; and France and England agreed to make peace, without tying themselves down to abandon their allies; so that it was possible for each to remain at war in a certain *territory*, as *Auxiliaries*, though the two countries respectively continued at peace at home. The following article acknowledges it in language the most express:

Fredericus rex Romanorum et Siciliae, erit in nostra treuga si voluerit, et rex Otho similiter, erit in treuga regis Angliae, si voluerit; et si

(x) See Vattel L. 3. S. 101.

alter

alter illorum noluerit esse in treuga, nos poterimus juvare Fredericum in Imperio; et rex Angliæ Othonem in Imperio similiter; absque mesfacere, et absque faciendo guerram inter Joannem regem Angliæ et nos, de terris nostris. (y)

In like manner, towards the end of the same century, when the most determined war prevailed between Arragon and Rome, in which Naples was the chief support of the latter; it was stipulated by the Treaty of Oleron, which was to give peace to Sicily and Naples, that JAMES, King of the former country, should be allowed, notwithstanding that peace, to assist his brother the King of Arragon in whatever war he undertook. (z)

In like manner, also, after the Treaty of Bretigny, between JOHN of France, and EDWARD III. of England, *Henry de Transtamare* being raised up by JOHN to balance the interest of England with his brother the King of Castile, he was bound by Treaty to serve the King of France "*envers et contre tous*;" for which he had a pension

(y) Rym. 1. 112. Leibnitz. Cod. Dip. p. 9.

(z) Burign. 2. 220.

of ten thousand livres, and a promise of an honourable retreat, in case he failed in his enterprises. (a) But as the name of *England* did not appear in the Treaty, it could not declare war against France, and both countries engaged in the war of Castile as *Auxiliaries*, without interrupting their amicable intercourse at home. The soldiers of France fought the battles of *Henry*, and the power of England was led by the BLACK PRINCE to the assistance of PETER; and each nation again encountered one another in Spain, though, in conformity to the rules of the world, in other parts they remained at peace. (b)

Mankind had made a considerable advance in the diplomatic science, when such refinements were held legitimate. The Romans pursued a very different conduct, and much nearer to the law of nature, in considering every ally of an enemy as an enemy himself. Other nations thought so too; and the total

(a) Trefor, des Chartres, ap. Villaret. i. 272.

(b) See the reasoning before-mentioned in the case of the Marechal D'Andregam, Chap. XIV.

destruction

destruction of their city by BRENNUS, was the well-known consequence of the assistance they gave to the enemy of the Gauls.

OF TREATIES OF SUBSIDY.

Not unfamiliar to these Alliances, were the *Treaties of Subsidy*, so frequently to be met with all through the history of Europe, and which have grown to be so important a part of the *Jus Publicum* in modern times.

The invention of money, among other revolutions which it caused in the affairs of mankind, brought about that great one, of investing those who possessed it, with a potent and manageable instrument of raising a power which they could not well have commanded, if left to mere natural resources. Money, therefore, has not been improperly called *power* itself; and the character of it, as one of the sinews of war, is well known. By a proper employment of this great engine, the states of the world contrived to multiply their

U 4

forces,

forces, and had always at command a certain body of troops entertained for them by other nations, without thereby involving the whole force of those nations in their general quarrels.

In the application, however, of this doctrine, regard was of course had to the spirit of the various other institutions which at that time governed the world; and as the Feudal System, while it in general allowed the rights of peace and war to all great vassals, absolutely forbade the exercise of them towards the Lord Paramount; we find, that in making these Treaties of Subsidy, exceptions were constantly introduced in favour of those who might possess superiour rights over the parties.

This recourse to subsidy appears early in the history of Europe. So far back as 1101, we have a long and regular Treaty of this sort between HENRY I. of England, and the Earl of Flanders; by which, in consideration of four hundred marks a year, the Earl is bound to assist the King with five hundred soldiers, against all enemies who may attack him.

him in England, *except his liege Lord the King of France.* (c) A century afterwards, another Treaty is made to the same effect, between King JOHN and the Earl of HOLLAND; the soldiers to be in the pay of the King while within the realm: (d) and in 1295, we find a Treaty of Subsidy and Alliance between PHILIP LE BEL, and the same state; by which, in consideration of 25,000 livres paid down, and 4000 a year for life, the Earl promises to assist him in all his wars, *except an offensive one against his liege Lord the King of Germany*; to receive his troops within his territories at pleasure; and to make war against all his enemies, *being the Allies of the King of England*, particularly those “qui ont reçu ses deniers contre le dict Roy de France.” (e)

When EDWARD III. and PHILIP of Valois, were preparing for their great contest in *France*; they each of them sought Allies to themselves by every possible means; and a hundred thousand marks purchased a power-

(c) Rym. 1. 1, 2.

(d) Id. 1. 168.

(e) Leibnitz. Cod. Dipl. 34.

ful Auxiliary to the former, in the person of ADOLPHUS of Nassau. (f.) King CHARLES V. of France, surnamed the Wise, is also represented by an historian, as eager to gain foreign Princes on all occasions to his interests, by caresses and pensions, for which they were to furnish him with a certain number of men; and the *Tresor des Chartres* is full of *Deeds*, by which he obtained the services of soldiers of all ranks, from Sovereigns down to simple knights, drawn from the frontiers of Flanders, and Brabant, from the Rhine, and the interior of Germany. (g)

The military spirit of the age, assisted by CHIVALRY, which taught men to offer their services wherever they were most wanted, contributed without doubt to the universality in which this custom was established; and Europe saw every where vast bodies of men in arms, who, if they had no quarrel of their own upon their hands, were ready at the call of those who had. To *subsidize* therefore, as it was an obvious, so it soon became a general practice; and one part of a nation might

(f) Rym. 3.

(g) Villaret. 2. 8.

legitimately be lent to the assistance of another state, without bringing down upon the whole, the hostilities of those against whom it was directed.

It was hence that the character of a soldier of fortune arose, a description of men very antiently known in Europe. It appeared under various shapes, and almost at all times; under the name of *Rowters* in the twelfth and thirteenth, and under that of the *Companies* in the fourteenth century. (b) In Italy they were known by the appellation of *Condottieri*, or Leaders of Bands; who made a trade of war, trained up soldiers in *their own pay*, and let them and themselves out for hire, to every state, and to every cause, that stood in need of them. (i)

Finally, the Treaties of Subsidy which were formed by several Powers, particularly France, with the *Swiss Cantons*, are strong instances of this refinement in the Law of Nations. By those Treaties, the best troops

(b) Speed. 490.

(i) Robertson, Ch. v. 1. 160.

of *Switzerland* have been vigorously employed against particular states, without their conceiving, on that account, that they had a legitimate cause for quarrel against the community which punished them. LEWIS XI. is said to have been the first who began to subsidize the Swiss upon a system. He found that they could be redoubtable enemies; and, taking advantage of this custom, (which thus allowed of a partial employment of their forces, without on that account endangering the whole,) he converted them, by means of subsidy, into the most serviceable of his friends. (*k*)

The *advantage* of granting subsidies to foreign troops, for fighting battles in which they are no wise concerned, it is rather the object of politics, than of the Law of Nations to settle: but its *propriety* upon moral and *Christian* principles, it would not be improper to discuss. As this work, however, is more an historical deduction of what *was*, than a dissertation on what ought to be, I shall not here go into the question. At the same time

(*k*) Garnier. 1. 491. Recueil des Traitez. 1. 599,

the subject itself demands the mention of several celebrated bands of these soldiers of fortune, whose actions were attended with many remarkable and melancholy effects upon the affairs and the jurisprudence of the world, and will serve to shew very powerfully the evils to which they are liable, whenever the general order of things is deranged.

In the beginning of the fourteenth century, the perpetual wars of Sicily had overwhelmed that fine island with troops of all nations. Most of these, it should appear, were *Mercenaries*, who, consulting the genius of their order, and influenced by the barbarity of the times, refused to lay down their arms after their employers had made peace, and continued a way of life which was no longer lawful. (1)

(1) Porro Sicilia tot bellorum motibus libera, in militum *Catalanorum*, Arragonensium, Calabrorum, et Siculorum, rapinas et depredationes incidit. Quos Fredericus ut Insulam expurgaret, contra Turcas qui Constantinopolim infestabant auxiliares misit. Fazellus de rebus Siculis. 477.

FREDERICK,

FREDERICK, King of Sicily, was at a loss how to disband them ; and, as the only means of delivering the island, he sent them, to the amount of eighteen thousand, as *Auxiliaries* to ANDRONICUS, Emperor of Constantinople, against the Turks. Their Commander, Roger de Flor, acquired the great duchy of Romania, and performed signal services for the Emperor. In the course of five years, however, they turned against their new employer, and fought and defeated his son Michael, in a pitched battle. They afterwards entered into the service of the Count of VA-LOIS, who pretended to the throne of Constantinople ; and afterwards again, into that of WALTER de BRIENNE, Duke of Athens. Quarrelling with this latter Sovereign, as they had done before with the Emperor, they fought and killed him, and even took possession of his country, which they formed into a *state* for themselves, under the title of the GREAT COMPANY. They preserved their full independence till the year 1326, (four and twenty years after their departure from Sicily,) when they put themselves under the protection of their old employer, King Frederick ;

Frederick; (*m*) and, under his Viceroys, they existed for years as an *acknowledged* state, till they were lost amid various other revolutions. We have thus the picture of a body of men, collected at first by legitimate commissions, disposing of themselves by *Treaty*, in virtue of a kind of *bastard* Sovereignty, till they at length actually became Sovereigns themselves. (*n*)

Similar to this, but attended with more various, and, to us, more interesting circumstances, is the history of those famous Mercenaries in the middle of the same century, known by the name of the COMPANIES.

The quarrel for the crown of France between EDWARD III. and PHILIP of Valois, had thrown the whole world into arms; and the great length of time during which that quarrel lasted, brought immense bodies of foldiers from all nations into the kingdom

(*m*) Burigny. 2. 245. 6. 7.

(*n*) It is hardly necessary to observe, that this is a very different case from that frequent one of an Ally (*being already a Sovereign Power*) called into the assistance, and becoming the destruction of a weaker State.

which

which was the object of contention. The military spirit expanded itself still more than it was naturally inclined to do, and the profession of a soldier seemed literally to have annihilated all others. When therefore by the Treaty of Bretigny, 1360, a general peace was agreed upon between the rival Powers, there remained all over the seat of war a vast multitude of armed bands, whose ravages had hitherto been authorised by the sanction of Sovereigns, but who could now no longer continue their mode of life, without incurring the vengeance of the law. It was not, however, for such men to understand how the same conduct could be morally different, because they were in different situations; and that what at one moment had been their duty, should of a sudden have become a crime. When therefore the two governments had disbanded their several powers, without taking the precaution of providing them a retreat, or pointing out to them the means of honourable industry, they were led, not unnaturally, to continue the only profession which they had probably known: and as the cause they had engaged in, was indifferent to the greater number of them, a change in their appellations

tions was the only point that distinguished them in their new characters. Their occupations continued almost exactly the same; but the name of Soldier, was degraded into that of Robber.

According, therefore, as they were disbanded, they formed themselves into COMPANIES, and electing some of the boldest of their body as their Chiefs, they fell upon every thing that came in their way, with a rage which was so much the more violent, as it was removed from all the restraint under which they had formerly lived. Not only private houses, but cities; not only the highways, but whole provinces, were ravaged by these merciless men; and the distinctions of sex, of age, and even of friend and enemy, were all confounded. (o)

Their numbers and actions made them respected, as well as dreaded; they formed enterprises superiour to the force of many regular states; and in the end, as we shall observe, they acquired nearly as much conse-

(o) Froiss. V. 1. Ch. 214. Vie de B. du Guescl. 88.

quence, by forcing *Sovereigns* to treat with, and in some measure therefore to acknowledge them.

At first the King of France considered them, as he had a right to do, as rebels and freebooters. They were not authorised by any *Sovereign Power*; they made war under no commission but their own swords; and hence they have been called by an old historian, "*Filii Belial, Guerratores de variis nationibus, non habentes titulum.*" (p)

Success, however, obliging the King to pursue a different plan: one of their armies, mustering sixteen thousand strong, encountered JAMES de BOURBON, a Prince of the Blood of the first accomplishments, attended by the flower of the French CHIVALRY, and defeated and killed him at *Brignais*, near the banks of the *Rhone*. They afterwards pillaged the whole of the *Lyonnois*, and other provinces; and, marching straight to *Avignon*, resolved to plunder the whole Consistory, together with the POPE himself. From this

(p) Continuat. of Guill. de Nangis. 1360.

they were only diverted by the Marquis of *Montferrat*, a Sovereign Power, who by *Treaty* took them into his pay, and ventured to employ them in his wars in Italy. (q)

Five years passed on, during which France continued a prey to their ravages, in her fairest provinces, without a possibility of restraining them; and the complexion of the times, and the custom we have been considering, tended palpably to increase, instead of diminishing the evil.

The mode which had been adopted, of granting subsidies to particular Chiefs of renown, for the purpose of holding in readiness a constant supply of armed men, was favourable to the COMPANIES in the highest degree; and so far from being repressed, they were encouraged, and actually joined, by men whose names in other times, would have made them blush at their perversion of a profession, of all others perhaps the most truly noble, as well as the most brilliant. Accordingly, about this time, we find the character of these

(q) Froiss. V. i. Ch. 215.

robbers raised, and the remembrance of their actions almost done away, by the accession of such men as CALVERLY, GOURNAY, ALBRET, AUXERNE, ANDREGHAM, (a Marshal of France,) and even of DU GUESCELIN himself.

An immediate field of action was sought by these officers in *Spain*, where HENRY de TRANSTAMERE held his arms open to receive them; (r) and such was the weakness of *France*, that it was the only method she could devise, by which to get rid of such dangerous enemies. Upon those, therefore, whom CHARLES the WISE had at first treated as rebels, he condescended at last to confer a kind of *legitimacy*, by actually making a *Treaty* with them to evacuate France; in the course of which their Chiefs were entertained with all possible honour at *Paris*, (s) and received a supply of 200,000 livres as the price of their retreat. It was upon this occa-

(r) Froiss. i. 230.

(s) One of these Chiefs was Hugh de Calverly himself, a very accomplished Knight of the English party, and, as we have seen, (Chap. XIV.) the brother in arms of Du Guescelin.

from that DU GUESCELIN was given to them as a leader, and his influence with them was probably occasioned by the iniquitous offer of leading them first against the court of *Avignon*. In the course of that visit, the unfortunate Pontiff was treated with the utmost contempt and harshness by this celebrated General, who, all accomplished as he was in the virtues of *knighthood*, displayed upon this occasion the talents and the boldness of the most lawless freebooter. He exacted 100,000 florins for the ransom of *Avignon*, and ravaged the whole country till it was paid. (*t.*)

After their well-known success in the cause of HENRY de TRANSTAMERE, the Black Prince resolving to restore the King they had dethroned, recalled all those of their number that depended upon England; and such was their reverence for his authority, that they instantly obeyed his summons, and forced their way out of *Castile*, in spite of all opposition, (*v*) only that they might return

(*t*) See the particulars of this remarkable transaction set forth with much spirit, and at the same time, simplicity. Vie de Bert. du Guescl. 89, 90, 91.

(*v*) Froiss. 1. Ch. 279.

to it against the very cause they had so successfully espoused. In their second expedition, they were equally fortunate as in the first; and, upon their return into France, which they called their Apartment, (*leur Chambre*;) being dismissed by the Prince of Wales, they still continued embodied, and sat themselves down on the banks of the *Loire*. Farther they were desired not to retreat by EDWARD, who foreseeing the impending war with France, told them he might still have occasion for their services. The King of France also, from the same cause, held a large body of them in readiness on the other side; and thus we again behold this memorable class of men, now *freebooters*, now regular soldiers, changing services and characters, as accident, or interest, or the exigences of the times, required. In 1374, fourteen years after the rise of these Subsidiaries, upon the truce between France and England, ENGUERRAND de COURCY, finding them without employment, entered into a *Treaty* with them to follow him into *Austria*, to the succession of which he laid claim.

Such

Such then was the consequence, in the fourteenth century, of the custom of hiring mercenary troops; and I have judged it the more necessary to make this mention of them, because in the above examples we may observe an almost new and independent *state*, rising on the bosom, and in very spite of other States, and preserving themselves there, at first indeed by *force*, but afterwards by *law*.

Something not unfimilar to this, arose even in the last century, during the height of the famous Thirty Years War; when, the whole Continent being in arms, and no profession known but the military one; the contending States saw vast bodies of men, strangers, as well as subjects, ranging themselves under the standards of various Chiefs, who owed their fortunes and independence solely to their talents for war. The universal disorder that prevailed, offered perpetual opportunities to their ambition; and according to their resources in raising men, or their ability in commanding them, they were courted and protected by the Sovereigns around them; *and by the Treaties they made*, became actually a kind of Sovereigns themselves.

The most illustrious of them were the gallant Count MANSFELDT, and the famous Duke of SAXE WEIMAR. The latter was subsidised by RICHELIEU in the service of France. It was however in the same manner as many modern potentates are subsidised; more in order to annoy the enemy, than to augment the possessions of the *subsidising* power. The Duke made conquests in his own name all along the Rhine; he took *Brissac*, the then key to *Alsace*, and garrisoned it for himself; and of such importance was his army, though the Sovereignty (if it was one) which they formed, was almost confined to their camp; that upon the death of their leader, the greatest Princes entered into Treaty with them for their services and their possessions. The Emperor, the King of France, the Duke of Saxony, and the Elector Palatine, were all rivals upon this occasion. The Emperor, as a Sovereign whom they had offended, but who was willing to forgive them; the King, as the power whose supplies had enabled them to keep the field; the Duke, as the heir by will of their late Commander; and the Elector, without any pretension at all, but that of money to *purchase*

chase their right. This last, however, was known to be so powerful, that RICHELIEU did not scruple to arrest him on his way to the army, on the ground of his entering the kingdom without a Safe Conduct; (w) and being thus left with less potent rivals to combat, he succeeded in purchasing by a *Treaty of Subsidy*, the services of the army, and the conquests they had made in Alsace. (x) In the course of the affair, the acquisition of *Brissac* from the Baron d'Erback, the Governor for WEIMAR, is said to have cost the celebrated Marshal de GUEBRIANT as much trouble in negotiation, as a regular siege would have cost him in war. (y)

Throughout the whole of these transactions, it is evident that the Duke of WEIMAR, who had not originally possessed a foot of land in

(w) Bougeant. Hist. de la P. de Westph. l. 5. S. 58.

(x) The heads of the army are described simply as the Gentlemen, Directors, and Officers of the troops which the late Duke of Weimar commanded; no mention is made of them as belonging to any Sovereign State. Du Mont. II. 184.

(y) Bougeant. l. 5. S. 55, 57.

Sovereignty, (z) was yet considered as a Sovereign by those who treated with him; and he is represented by an historian, as desirous of forming that establishment for himself in *Alsace*, which, while he lived, he jealously defended against his very employers the *French*, and which, had he not died, would have probably conferred upon him the title of its LANDGRAVE. (a) These are some of the important consequences which in a time of *general and continued warfare*, may attend upon the custom of subsidizing; the whole legal force and extent of which, must, as we see, derive their original spring from *Treaty and Convention*.

(z) *Bernard* n'avoit pour tout bien, que l'honneur d'être issu de la branche aînée, de la Maison de Saxe. Id. Sec. 56.

(a) Id. Ib. Men who are fond of speculation might pursue the reflections which are naturally supplied by this account, as applicable to the present situation of affairs on the Continent. A very little time has passed since *Dumouriez* promised to be as celebrated a soldier of fortune as the Duke of Weimar.

OF COMMON CAUSE.

TO Treaties is also owing another custom, which has been received by the Law of Nations, but which, whenever it takes place, is certainly an abandonment of that universal independence enjoyed under the state of nature. I mean the obligation by which particular nations have often bound themselves, to make *Common Cause* against others, and agreed not to lay down their arms except by general consent,

By these confederations, the connections of States were not only multiplied, but improved into very strict ties of amity, often ending in a departure from that impartial neutrality which in the abstract they preserve towards one another. The indiscriminate warfare which had attended the early Barbarians, came thus to be modified; nations ranged themselves under different alliances; a fixed object was proposed; and the embryos of what afterwards grew into the system called the Balance of Europe, began to appear.

The

The perpetual contests between the two great kingdoms of *France* and *England*, gave rise to many cases of this sort in the earlier parts of their history ; and in arranging these alliances, they were naturally much governed by geographical situation. *France* sought a sincere and powerful friend in the King of *Scotland*, which produced the suspension of the *Jus Albinatus*, in favour of the latter nation ; *England*, as naturally, looked to *Flanders* and to *Spain* for the same sort of assistance. So low down as 1197, we have a full example of it in the Treaty between RICHARD I. and BALDWIN Count of *Flan-*
ders. In that Treaty it is agreed that neither party shall have the power of laying down his arms in the war against *France*, without the consent of the other ; that even after that consent, and when peace shall be made, each shall be held ready to assist the other with all his power if the King of *France* should make war upon him ; and the alliance is to endure, not only during their lives, but for ever between their heirs, whether their States shall be at peace or war elsewhere. (*b*) In the

(*b*) Rym. i. 94.

same manner an alliance exactly similar was made between the same *Baldwin* and King *John*; (c) and in consideration of the proposed marriage between HENRY III. and the daughter of the Duke of *Britanny* in 1225, the King of *England* agrees that he will make Common Cause with the Duke, against all his enemies; and that on the *Continent*, he will neither make peace, nor truce, with them, without his consent. (d)

In 1266 we have a very extraordinary Treaty of this kind between HENRY Earl of *Luxemburg*, and FERRY Duke of *Lorrain* against the Earl of *Bar*. HENRY obliges himself never to assist the Earl of *Bar* against *Ferry*, even though he (Henry) should be at war with *Lorrain*; and in that case also, if *Bar* should take the opportunity to attack *Lorrain* at the same time, he actually

(c) Rym. i. 114.

(d) Erimus eidem Duci consulentes & adjuvantes cum posse nostro, ad jura sua defendenda et perquirenda; et quod cum nullo de inimicis nostris et ipsius ducis, in partibus transmarinis, pacem faciemus, vel treugas capiemus, sine assensu ipsius ducis. Rym. i. 284.

oblige

obliges himself to make peace and join his forces against *Bar.* (e)

It is evident I think, that the modern practice of making alliances of Offence and Defence arose from this, as they bear a near resemblance to it in effect, though their form is obviously different. All the distinction however, is, that our downright ancestors named the very persons against whom the alliance was made; while the modern refinements have confined it chiefly to Quotas, and wrapt up the object in general terms.

OF RENDERING UP OUTLAWS.

UPON the same principle with the last are those articles of *Convention*, by which two, or more Powers agree to wave their right of granting an *ASYLUM* to the subjects of one another, and mutually to render them up even without being required.

(e) Du Mont. Corps Dipl. i. 224.

The right of protecting all who may come within the bounds of an independent Community, has been always held one of the most valuable prerogatives of Sovereignty; and any invasion of it has ever been strenuously contested. Nevertheless to grant protection to those who have offended the peace of other Communities, is itself little less than the same sort of crime. A difficulty not inconsiderable therefore arises in determining between the two contending rights, the readiest way of avoiding which, is by having recourse to *Convention*.

This was early adopted by the European nations, and Treaties are frequent by which it is stipulated that nations shall mutually give up to each others power, the criminals that may have sought refuge with them, from the justice of their own country. A few cases only of this sort need be mentioned. By a Treaty between WILLIAM King of Scotland, and HENRY II. of England, in 1174, it is agreed that if persons guilty of felony shall have fled from England to Scotland, they shall be immediately seized, and either be tried in the *King of Scotland's* Courts, or delivered

livered up to the Justices of England, and vice versa. (*f*) By the Treaty of Paris, May 1303, PHILIP III. and EDWARD I. refuse to grant protection to each other's *Outlaws*; (*g*) and by another, between CHARLES V. of France, and the Duke of Savoy, 1378, all malefactors who had fled for refuge from Savoy to Dauphiny, or from Dauphiny to Savoy, were to be rendered up to justice, *even though they should be the subjects of the State delivering them.* (*h*)

These cases fell far short of those Treaties of Confederation formerly mentioned, but they serve to shew in an eminent degree, the manner in which the union of particular States came to be extended, and above all they prove to us the superiour regularity of the times in comparison with those in which all strangers who came upon a foreign territory were immediately seized and reduced to slavery. (*i*)

(*f*) Rym. 1. 39. M. Par. 131. 37.

(*g*) Id. 2. 924.

(*h*) Receuil des ordonnances. ap. Villaret, 1. 553.

(*i*) Vide Chap. VI.

OF TREATIES WITH POWERS, NOT
CHRISTIAN.

BUT of the various effects produced by Treaties on the custom and practice of nations, not the least considerable was the amicable occasion which they afforded, to *Sets* of people of discordant religions and manners, of acquiring a better knowledge of each others institutions. This alone was a powerful instrument to soften those sturdy prejudices, which ignorance of one another never fails to inspire; for even in common life we generally observe, that the strongest antipathies may be contracted without foundation, and may be removed, simply by an opportunity of becoming acquainted.

It was thus in fact that the horrid enmity of the CHRISTIAN and MAHOMETAN nations, which had been generated by the strongest of all prejudices, and kept perpetually active by the evils which they had mutually inflicted, began at last to give way to the natural course of things.

To treat with *Infidels*, as we have formerly observed, was esteemed infamous; and the persons who could so far forget their character as Christians, were held up to public detestation. The notion existed long; it was a strong instrument in the hands of the Popes against the all-powerful FREDERICK II. (k) and not a weak one, so far down as the sixteenth century, when FRANCIS I. was loaded with opprobrium in consequence of his alliances with the *Porte*. On this occasion, in order to regain his character in one point, that Monarch was forced to stoop to what was the greatest stain upon it in another. He had been among the first of the age in reputation for liberality, and clemency; yet he sullied his glory by executions that were only worthy the ferocity of a bigot. (l)

Even so far down as the beginning of the seventeenth century, these prejudices retained so much of their weight with the Protestants themselves, that GROTIUS thought it worth while to go at large into the question; and though he allows that, as a general position,

(k) See Chap. XIII.

(l) Daniel. Hist. de Fr. fol 2. 298.

it may be permitted, (or rather that it is not forbidden) to make an alliance with *Infidels*; yet he treats of these alliances with singular caution. For example, he says that care must be taken not to suffer the connection to be too intimate, lest it might be the means of corrupting weaker understandings; and for this purpose, if there are many *Christians* within an *Infidel* territory by virtue of an alliance, he thinks that after the example of the *Israelites* in *Egypt*, they ought to keep themselves as distinct as possible from the inhabitants. (m)

Again, if the alliance is likely to prove the means of rendering them too powerful, he absolutely forbids it; without the extreme of necessity; for, says he, there is nothing so just in itself, but must give way, if it is either directly, or indirectly hurtful to religion. He even goes on to say, that Princes and States ought to bear in their minds upon this subject, the pious and bold address of an

(m) Cavendum enim ne nimia commixtio, contagium adferat infirmis, quam ad rem utile erit sedes distingui, sicut *Israelitæ* seorsim ab *Ægyptiis* habitarunt. De jur. B. et P. L. 2. cap. 15. S. 11.

Archbishop of Rheims to CHARLES the SIMPLE, when he told him that all men were terrified to observe him courting the friendship of the enemies of God, and making leagues with them to the destruction of the Christian name ; for what *difference*, adds the holy Ecclesiastic, *is there between associating with Pagans, and denying God, or worshipping Idols ?* (n)

Grotius finishes the subject with laying it down, that all *Christian* nations are bound to assist one another against the attacks of *Infidels* ; and it was no doubt in consequence of the universality of these prejudices, that the

(n) Sed et si ex societate tali, profanæ opes magnum sint habituræ incrementum, abstinendum erit extra summam necessitatem. Non enim jus quodvis sufficit ad id committendum, quod religioni, si non directe, indirecte tamen, nociturum putetur. Id. Sec. II. 2.

Optandum esset ut multi hodie principes ac populi, in animum admitterent liberam et piam vocem Fulconis Archiepiscopi Remensis, Carolum Simplicum sic admonentis. Qui non expavescat vos inimicorum Dei amicitiam velle, ac in cladem et ruinam nominis Christiani, pagana arma et fœdera suscipere detestanda ? Nihil enim distat utrum quisse paganis societ, an abnegato deo Idolas colat. Id. Sec. II. 3.

cotemporary

cotemporary of Grotius, (Sir Edward Coke,) has advanced, or rather preserved, doctrines to the same purport, as forming part of the laws of England.

In the fourth Institute, the following positions with their commentary, are supposed to be the settled laws of this realm.

There be four kinds of Leagues.

I. Fædus pacis; and that a Christian Prince may have with an Infidel.

II. Fædus congratulationis, five consolationis; and this may a Christian Prince make with an Infidel.

III. Fædus commutationis mercium, five commercii; and this also may be made with an Infidel.

IV. FÆDUS MUTUI AUXILII; *and this cannot be done with an Infidel. (o)*

These four positions, the learned Chief Justice founds upon examples drawn from the Jewish history; and the last of them, upon the example of JEHOZOPHAT, King of

(o) Fourth Instit. 155.

Judah; who having made an alliance with *Achab* King of Israel, an Idolater, was not only in extreme danger during the war, but was met after his return home, and slain by *JEHU*, for giving assistance to the enemy of God. (p) Thus, from cases drawn from a very ancient part of the history of a very remote people, and who were under the government of very particular institutions, the Law of Nations, at least as it is made part of the Law of England, is supposed to inhibit alliances between *Christians* and *Turks*; "for thus," adds his Lordship, "the Laws of England, concerning these four Leagues, are as you perceive founded upon the Laws of God." (q)

With every proper deference for so high an authority as my Lord Coke's, this prohibition is now no longer law. Mankind have, in a great measure, left off persecuting one another on account of their religion; and Leagues offensive, and defensive, are made in every part of the world, without any reference to their points of faith. (r)

(p) *Id. Ib.*

(q) *Ib.*

(r) *E. G.* between *Christians*, and all the various religions of *Asia* and *America*.

We

We are not however to suppose that this alteration is absolutely of modern growth. Though it was not very universal, traces of it are to be found far back in the history of Europe. It was *Convention* that first gave it birth, and the exterminating hatred with which the Christian and Saracen people beheld one another, was at length made so far to bend, as to admit of the propriety of entering into Treaties together. If I may be allowed the expression, they *conquered* one another into mutual respect; and Treaties once begun, a variety of good consequences followed. A freedom of intercourse was agreed upon; the forfeiture of liberty, of effects, or of life itself, was no longer the terrible punishment for the crime of entering into each others country; and what had long been prescribed by true religion, and even by common humanity in vain, was at last stipulated for with effect by express agreement. In many parts, the two races were so mingled together with the same district of country, that after having fruitlessly endeavoured to destroy one another, they came actually to consider that they were mutually entitled to the rank of *legitimate States*, and

as such to form alliances, according as their political interests directed.

This was very much the case in *Spain*; a country nearly divided between the two religions, and the people of the two religions, often divided among themselves. In this situation, each party was constantly on the watch to prejudice the other as occasion might invite, and for that purpose interfered in the numerous petty wars of the Princes that shared the country, without much attention to the religion of those whom they attacked, or of those with whom they made alliance. Thus the weaker Princes of one religion, very often sought the protection of the other, against their more powerful brethren. The *Moors* who were expelled from their own States, took refuge with the *Christians*, and the *Christians* on the other hand sought an asylum with the *Moors*. As the fortune of war also, was for a long time balanced among them, and States could not be entirely subdued, the two people in their intercourse together, were forced to imitate the customs they observed among themselves, and became *tributaries*, or bound by unequal alliances, when

when a total conquest could not be effected. (s)

This sort of connection, notwithstanding the general prejudice upon the point, is to be

(s) A number of examples of this are to be found in the eleventh century.

Sanchez, Count of Castile, was the Auxiliary of *Zuleiman*, in obtaining the kingdom of Cordova from *Almahadi*, in 1008. The Count of *Barcelona*, was the Auxiliary of *Hissam*, the true Sovereign, in recovering it; and *Sanchez*, abandoning the unsuccessful party, afterwards entered into a firm alliance with the latter King.

The Count de la *Vela*, being driven from his little Sovereignty of *Alava*, in Castile, in 960, took refuge with the *Moors* of Cordova, with whom he made Alliances, and returned to the destruction of the *Christians*.

Garcias, King of Gallicia, losing his dominions in battle to Castile, in 1070, fled in like manner, to the Court of *Seville*, the greatest of the *Mahometan* powers; and in 1063, the Moorish King of *Saragossa*, being under the protection of the King of CASTILE, and invaded by the *Arragonians*, the Christians took arms against the Christians in favour of their Moorish tributaries, and the famous *Cid* himself, commanded the protectors of *Saragossa*. Mod. Un. Hist. 16. 187, 8. 212. 17. 89.

Peter the Cruel also, in the fourteenth century, fled to the *Miramolin* of Africa, whose daughter he is said to have married, in order to raise up a second party against his brother *Henry* de *Transtamare*.—*Froiss.* & *Vie de du Guesc.* 156,

dis.

discovered in other countries besides the *Spanish* kingdoms. As the Saracens had contrived to fix themselves in various corners of Europe, without the possibility of dislodging them; the Christian Princes, especially the more politic of them, began to think it lawful to soften the evil, by availing themselves of whatever good they could extract from it. When they could not therefore root them out by *Conquest*, they endeavoured to make them useful by *Alliance*; and ROGER I. King of Sicily, though styled, as we have seen, by the Pope in the grant of that crown, the *Exterminator* of Infidels, (t) did not scruple to take whole bodies of Saracens into his pay. The same policy was pursued by WILLIAM III. (u) in the same island; and the Emperor FREDERICK II. defended a similar measure when it was imputed to him as one of the crimes which occasioned his deposition at the Council of Lyons. (v)

This latter Prince, who seems to have been eminently qualified in the arts of government,

(t) Chap. XIII.

(u) Burign. 2. 3. Fazellus calls him Roger II.

(v) See Chap. XIII.

was far above the prejudices of his age in this respect; and a Treaty, nearly as regular, and calculated to produce as beneficial effects as any that have passed since his time, was effected by him with ABUSSAC King of Morocco, in 1230. By this it was agreed, That slaves should be rendered up on both sides; That the ports of *Africa* should be opened to the *Christians*, who should not be molested in their commerce either in going or coming; That the *Mahometan* merchants who came within the States of the Emperor, should be exempt from the payment of the tenth part of their effects; and that they should have liberty to send an intendant into the island of *Corfica*, who should have jurisdiction over the *Mahometans* there established. (w) This latter was plainly the same as a modern Consul, the custom of establishing which, throughout the trading nations of the world, has also arisen entirely from *Convention*. A Treaty similar to this was at the same time entered into with ABUSSAC by the Republics of *Venice*, *Genoa*, and *Pisa*, and by the city of *Marseilles*. (x)

(w) Leibnitz Cod. Diplom. p. 13, (x) Id. Ib.

It is remarkable, however, how long Europe went on with these prejudices subsisting between the two religions, owing chiefly to the inveteracy of the Mahometan ignorance; the Treaties which England entered into with many of the Barbary States, in the present and last centuries, being little more than amplifications of this Treaty with ABUSSAC. They are a strong elucidation of the manner in which Convention came to change and to amend the errors of the Law of Nations. (y)

Alliances during the times before us, were not disdained between the two Religions even in the *East* itself, the climate in which the prejudices we have been mentioning were most predominant, and where they broke out into the most barbarous actions. Both *Christians* and *Mussulmen*, sought the aid of one another against their own brethren, when impelled to it by interest, mindless of the general hostile principles that inflamed them.

For example; The Crusades had always been destructive to the Greek Empire, though it was ranked among the worshippers of Christ.

(y) See Chap. V.

During

During the first of them, in the eleventh century, the Greeks were supposed to have got rid of their ruinous guests by the infamous means of poison. During the second, in the twelfth, they endeavoured absolutely to prohibit their entrance, by making a close league with the Sultan of Syria himself. (z)

In 1166 the Caliph of *Ægypt*, beheld the armies of a *Christian* King of Jerusalem, march to defend him against the Mahometan Despot, and submitted to what was considered as a species of pollution by his Courtiers, in receiving the Ambassadors of Jerusalem in person, and ratifying with his own hand, the treaty of subsidy which had been made with them. (a) In 1185, the Pope himself (LUCIUS III.) condescended to solicit the friendship of the accomplished SALADIN; (b) and it was to an alliance made with the latter in 1191, by Guy de Lusignan, King of Jerusalem, against RAYMOND Earl of Tripoli, that the total expulsion of the Christians

(z) Vie de Salad. par Mar. L. 9.

(a) Gulielm. Tyr. 14.

(b) Vie de Salad. par Marin. r. 423.

from that celebrated kingdom was ultimately owing. SALADIN, like many other auxiliaries, more powerful than those they assisted, seized the opportunity which was given him by an interference thus invited, and conquered for himself, what he was in vain expected to restore.

In the course of time, Alliances became more frequent, and not long before the application of FRANCIS I. to the Porte, for assistance, the end of the fifteenth century beheld the same sort of case, when ALPHONSO, King of Naples, and even the Pope (Alexander VII.) sent to implore the aid of BAJAZET, against the celebrated invasion of Charles VIII. (c) From that time, the prejudices of religion, and of a barbarous policy, have been gradually giving way before the slow, but certain effect of *Treaties*: The Porte, and even the African States, have taken their place in the EUROPEAN Commonwealth; and though many nations continue to make war without ceasing upon the latter, yet it is in consequence of

(c) Iter. Hierosol. ap. Gale. chap. v. Guicciard. L. i. an. 1494.

their

their *piratical* maxims, rather than their religion. At any rate, wherever they have been persuaded to adopt the milder law of nations inculcated by the Christians, we may observe that the mode of doing it was by positive Convention.

Thus by the third article of the Treaty with Algiers in 1686, (*d*) it is stipulated that the persons and goods of passengers on board the ships of the King of England, shall not be *stopped, taken, or plundered*: By the fifth, *all use of torture is inhibited*: By the sixth, persons who have suffered shipwreck, *are not to be made slaves*. In cases however which are out of the Treaty, the Algerines maintain the right which under a different Religion and Moral System they assume, since they also stipulate that to confer these immunities upon the English, a *Pass* shall be necessary for every ship; and those which have none are to be considered as fair prize. (*e*)

The eleventh article exhibits the operation of Treaties in favour of Religion, and the

(*d*) Vide Marine Treaties, p. 259. Quarto.

(*e*) Treaty. August. 10. 1700. Art. 2. Id. p. 265.

distinct-

distinction which is preserved between the professors of different faiths ; it being stipulated that if any *Christians* escape on board ships of war, they shall not be demanded ; in consequence of which, the Algerines make a condition that before this privilege shall be allowed to take effect, notice shall be given of the arrival of such ships, and public proclamations be made to secure the Christian captives.—The twelfth article entirely forbids the slavery of the subjects of Great Britain within the territory of *Algiers*.

Similar Treaties were made about the same time with Tripoli, and Tunis ; (f) and by the eleventh article of the Treaty with the latter, 1751, a great point is gained in prohibiting all piracy whatsoever within ten miles of Gibraltar and Mahon ; it being agreed that prizes from *every* nation made within those limits, shall be restored.—All these pretensions of the Barbary States had long as we have seen, been abolished among the Christians, in consequence of their consulting the true spirit of their duty, and their existence

(f) Treaty. August. 1700. Id. p. 275.

thus late among the Mahometans, can only therefore be attributed to the influence of an opposite and intolerant Religion, which made them reject that law by which we are *peculiarly* taught to love our neighbour as ourselves.

OF CONVENTIONS RESPECTING COMMERCE.

WE come lastly to consider one of the most important effects of Convention upon the laws of the world, in the improvement which it palpably introduced into its Commercial Intercourse.

Upon the broad subject of Commerce, as beneficial, or prejudicial to mankind, its mystery and nature, or the chronology of its general improvements, it does not fall within the scope of this Treatise to speak; nor, if it did, should I attempt it after the elaborate volumes upon the matter, which crowd the libraries of Europe. I shall merely therefore touch upon those parts of its history, in which the subject before us is more immediately concerned.

As far as it may be said to relate to the Law of Nations, from the *universality* of its adoption; it owes its regulation almost entirely to positive *Convention*. For although there is a natural disposition in men to truck and barter with one another, yet the modes by which this shall be done, or whether it shall be done at all, must be left to *Institution*.

A writer of eminence on the law before us, at the same time that he places it among our *bounden duties* to encourage the commerce of States; admits that they have the power of making what restrictions they please upon it, and that others are obliged to submit to them, on the supposition that they are founded on good reasons. (g) All things that contribute to the extension of this intercourse, he however also classes among our *duties*; as the care of Highways; the security of the Seas; the establishment of Ports; and the regulations of Markets and Fairs. (h)

As a general position, drawn from the morality which Christians are bound to fol-

(g) Vattel. L. 2. Ch. 2. S. 21. et infr.

(h) Ib.

low,

low, we cannot perhaps dispute this. But whether they can be derived, (*as duties,*) from the law of nature alone, (and such is the foundation of Vattel's whole system,) or whether, *setting the Christian morality out of the question*, it is not left to the absolute will, and even to the whim, or caprice of nations, to neglect all these circumstances, it may not be unreasonable to doubt. (*b*)

Certain it is, that there have been times when they have not only been neglected, but the very opposite conduct has been pursued, of which a variety of proofs have been given in the course of this work. The Law of Nations upon the subject while left to itself, even long after the establishment of CHRISTIANITY, was so extremely vague and indefinite, that no one could collect what was the conduct with respect to Commerce, which men had a right to expect from one another.

In this uncertainty, the positive *Institutions* of mankind, did that for them, which the *law of nature*, (according to our system,)

(*b*) Vide Suarez De Leg. ac Deo Legislat. 2. 19. 7.

would never have *obliged* them to do; and which the turbulence of the world, and the little real knowledge they possessed of their religion, had hitherto prevented it from teaching them. It may however be observed, that Religion had so far its share in the improvement of *Commerce*, as probably to have been the real, though invisible cause of the abrogation of those barbarous and dishonest practices, which retarded its progress; and at all events, whether it was Religion, or mere *natural* benevolence, or absolute and immediate interest, or a combination of all three; still it was through the medium of *Convention* and positive *Institution*, that the object was obtained.

The instances of barbarity that have been recorded in the course of this work, will serve to shew how little an intercourse which depends so entirely upon public security, could flourish during the earlier ages. It was hardly even possible for men to exercise a distant traffick, when every pass by land was infested with robbers, and every Sea was filled with Pirates, who pursued their callings, under *honourable* appellations.

I would

I would not however be thought to mean, that this was the only, or even the chief cause, why Commerce did not flourish. While the spirit of the age was entirely military, people were less inclined to turn themselves to occupations so contrary to their taste; and when the magnificent discoveries of the fifteenth century, opened new worlds to their contemplation, every sort of difficulty was made to bend to the genius which they inspired. Before this however, many nations had begun to discover the necessity for a more humane and safer intercourse; and not being then upheld by a general spirit of Commerce, they had recourse to *Convention* in some measure to supply its place. Accordingly, so far back as the time of CANUTE, efforts were made by express Treaty to obtain a mitigation of those heavy taxes and tolls with which travellers to Rome and other parts seem to have been loaded. That Monarch obtained from the Emperor CONRAD and Pope JOHN, “*Ut eis concederetur*” “*lex æquior, et pax securior in via Romam*” “*adeundi, et ne tot clausuris per viam arce-*” “*rentur, et propter injustam telonium fati-*

“garentur.” (i) The maritime States also, soon after the commencement of the period before us, found it necessary to make several provisions for the security of their mutual communications; the most striking of which were, the punishment of *piracy*, and the abolition by law, of the cruel rights pretended to by the inhabitants of coasts, against strangers who might arrive, or be driven upon them.

Of this, instances, as it may be supposed, were most frequent, among those who had been most infamous for the practices in question: and if the regulations that were made, had been only in a small part observed, the customs of the maritime people would have then been as eminent for their humanity, as they had before been infamous for their savageness and horror.

By a law of the *Swedes*, every housekeeper on the coasts, the Clergy and Nobility not excepted, was subject to a tax to relieve and repair the loss suffered by shipwreck. “For-
“*tunam ejus qui naufragium perpeffus est,*

(i) Will. of Malms. L. 2. C. ix.

“sublevare et refarcire.” (j) The Danish law proceeded upon the most regular principles of justice, and it probably affords the earliest example of *Salvage*, regulated by public constitutions. It ordained that the whole of the goods that were wrecked, should not be restored, but a certain portion of them be set apart for the people who had been called out to assist those in distress, and who were to be rewarded by the Master and Owners, according to an assessment to be made by the magistrates and maritime Præfects. (k) The Constitutions of Sicily under Frederick II. also deducted a portion of the merchandise saved, and any one who stole any part of it, was not only condemned to pay four times the value, but to suffer death. (l)

(j) Steirnhook, L. i. Pt. i. C. ix.

(k) Dani bona naufragantibus non restituant omnia, sed plebem, præmio auxilii proposito, ad opem naufragis ferendam, navemque et merces periculo expositas pro re rata conservendas ac recuperandas evocant. Posteaquam ita allatum est auxilium; *Præfecturæ Maritimæ*, Præses et Consul et Senatores definiant quantum mercedis pro rei conditione, merciumque pretio, auxiliatoribus a navarcho, vel mercatore persolvi oporteat. Jus. Dan. ap. Wilk. 104.

(l) Constit. Sicul. L. i. Tit. 28, 58. ap Lidenbrog.

In the same, and even a greater spirit of humanity, is the following law of Æthelred. Et quælibet Navis mercatoria, pacem habeat quæ intræ portum veniat, licet sit inimica navis, si sit tempestati jactata. Et licet non sit jactata, & confugiat ad aliquam pacis curiam, & homines confugiant ad curiam illam; tunc homines illi pacem habeant, & ea quæ secum portant. (m)

The English, (the long continuance of whose barbarous laws with respect to wrecks would mark them with infamy, had they not amply made up for it by the wisdom and humanity of almost all their other constitutions,) can however boast that foreign Merchants became early the objects of their protection and encouragement, since by MAGNA CHARTA, they are allowed to go, and to come, and to remain in England, by land and by water, for the purposes of trade, as it is expressly stated, "*per antiquas et rectas consuetudines.*" (n) It is the more likely that there were the *Antiquæ Consuetudines*, since

(m) Leg. Æthel. ap Wilk.

(n) Mag. Char. Cap. 30. The venerable Bede, more than four hundred years before this, had called London, "Multorum populorum Emporium."

in the reign before that in which Magna Charta was enacted, the laws and customs of the *Sea* had been a favourite object; and the laws of OLERON, which were actually composed under the direction of RICHARD I. became not only much in request, but formed the *common usages* among the maritime States, when their vessels passed through the British Seas. (o)

Of these laws, there are several articles, which mark very curiously the barbarous manner in which a barbarous nation conducts its struggles into good order. The XXIII^d and XXIVth of them are as follows.

If a Pilot undertakes the conduct of a vessel to bring her to St. Malo, or any other Port, and fail of his duty therein; so as the

(o) See the record *On the Dominion of the Sea*, quoted by Coke, 4th Instit. 142. Leges et Statuta per ejus Antecessores Angliæ reges, dudum ordinata *ad conservandam pacem et justitiam* INTER OMNES GENTES, NATIONIS CUJUSCUNQUE, ~~per~~ ^{per} mare Angliæ transeuntes, Quæ quidem Leges et Statuta, per dominum Richardum quondam regem Angliæ in redditu suo a Terra Sancta correcte fuerunt interpretata, et in Insula Oleron publicata et nominata in Gallica lingua *La Ley Oleron*.

anc
 vessel miscarry by reason of his ignorance in
 what he undertook, and the merchants sustain
 damages thereby; he shall be obliged to make
 full satisfaction for the same if he hath where-
 withal; *and if not, loose his head.*

And if the Master, or any one of his
 Mariners, or any one of the Merchants, cut
 OFF HIS HEAD; *they shall not be bound to*
answer for it: but before they do it, they
 must be *sure* he had not wherewith to make
 satisfaction.

The reader's own ideas of jurisprudence
 will point out to him, the manifest improp-
 riety of allowing the Master, or any one of
 his Mariners to be at the same time the judge
 and accuser in a case of such importance;
 and to cut off a man's head in a moment, as it
 may be supposed, of passion and revenge.
 Such however was the law.

The XXVth and XXVIth Articles are
 longer, and infinitely more just, though fully
 as severe. The Lord of the Coast it seems,
 had a right to the third or fourth part of the
 ships that were lost, and the Pilots, (in the
 language

language of the law) "in order to ingratiate
 "themselves with their lords, and to gain to
 "themselves a part of the ship and lading,
 "did like faithless and treacherous villains,
 "sometimes even willingly, and out of design
 "to ruin ship and goods, guide and bring
 "her upon the rocks; and then, feigning to
 "aid, help, and assist the now distressed
 "mariners, were the first in dismembering
 "and pulling the ship to pieces," &c. To
 remedy this, the law declares that the Lord
 of that place; the Salvors; and all others
 that are concerned, shall be accursed and ex-
 communicated, and punished as thieves and
 robbers; and the Pilot "shall be hanged
 "upon a high gibbet, which said gibbet
 "shall abide and remain to succeeding ages,
 "on that place, as a visible caution to other
 "ships that shall afterwards sail thereby."

The fate of the Lord is still more severe.
 "He is to be apprehended, his goods con-
 "fiscated and sold, and himself fastened to a
 "post or stake in the midst of his own Man-
 "sion House, which being fired at the four
 "corners, all shall be burned together; the
 "walls thereof be demolished; the stones
 "pulled

“ pulled down ; and the place converted into
“ a market place, for the sale only of hogs
“ and fwine, to all posterity.”

The XXXIst Article describes most horrible customs, and as horrible punishments to prevent them. It recites that when a vessel was lost by running on shore, and the mariners had landed ; they often, instead of meeting with help, “ were attacked by people
“ more barbarous, cruel, and inhuman, than
“ mad dogs ; who to gain their monies, apparel, and other goods, did sometimes
“ murder and destroy these poor distressed
“ seamen. In this case, the Lord of the
“ country, is to execute justice by punishing
“ them in their persons and their estates ; and
“ is commanded to plunge them in the sea
“ till they be half dead, and then to have
“ them drawn forth, out of the Sea, and
“ stoned to death.”

Such was the severity which Institution found it necessary to oppose to the savage violences that had been so inimical to Commerce ; and though it was in all probability, not always inflicted, yet the laws of *Oleron* which

which authorised it, and which, as we have seen, were the governing customs of the nations that navigated the BRITISH SEAS, are said to have been taken as a guide in forming the institutions of the famous commercial city of WISBUY.

This last was for some time, particularly about the end of the twelfth century, the most flourishing trading city of the North; and is described by *Olaus Magnus* to have risen to a great height of commercial consequence, by the security which it afforded to all comers both by sea and land. He adds a remarkable expression, (*nulli præclusum municipium*,) by which it should seem that every one was admitted to a participation of its privileges. Encouraged by this, all the greater nations of Europe, thronged to it for the purpose of Trade, and even those who approached near to their original simplicity, for so possibly the learned Archbishop may mean by the *Singulæ gentes suos proprios vicos et plateas incolentes.* (p) This gave so much influence to
the

(p) Confluxere illuc Gothi, Suedi, Russi seu Reutheni, Dani, Prussi, Angli, Scoti, Flandri, Galli, Finni, Vandalii, Saxones, Hispani, *singulæque gentes, suos proprios vicos*

the inhabitants, that all those who navigated the *Baltic*, are said to have governed themselves by the laws and principles of the Consulate at Wisbuy; and to have adopted from them a kind of *Law-Merchant*, which being regularly digested, decided differences by sea, much sooner than arms could decide them by land. (q)

Into the detail of these laws, it does not fall within our subject to enter; we cannot however help remarking on the care that was taken for the security of ships against the attempts of their crews by the following articles.

Whoever drew a sword upon the Master of a vessel, or wilfully falsified the compass,

*vicos et plateas incolentes, nulli præclusum municipium. In-
gredientesque, terra et mari, omnia paccata invenerunt.*
Olaus Mag. L. 2. C. 24.

(q) Ab hac etiam Insula (Gotlandia) in omni navigantium controversia, præsertim a Consulatu Visbyensi petitur et datur jus, et sententia diffinitiva, quid unicuique permittendum vel auferendum erit. Certe Jus hoc Mercatorum ac valde prudenter digestum, citius lites adimit in fluidis aquis, quam aliorum decisio in terra arma. Ib.

was condemned to have his right hand nailed to the mast. (r)

Whoever behaved riotously was condemned to be keel-hauled. (s)

Whoever was guilty of rebellion, was to be thrown overboard. (t)

It was unlawful also to arrest the Master, Pilot, or Mariners of a vessel for debt, *when about to set sail*; though the creditor might seize any thing belonging to his debtor which he could find *in the vessel*; (u) and this was a very small part of the regularity introduced by these laws, which became in a manner the laws of the world, since they extended, says the historian, from the pillars of Her-

(r) Ol. Mag. L. 10. c. 16. p. 448.

(s) Nothing can be more minute than Magnus's description of this punishment. Qui vero tumultuarius aut injuriosus fuerit, funiculo ligatus uno latere navigii subtus immerfus, ex altero sub dorso navigii retrahitur, atque si propter absorptam in gurgite aquam opus fuerit, supinus reponitur, aut pronus, ne intereat suffocatus.—Id. Ib.

(t) Ib.

(u) Artic. 6. L. of Wisbuy. Comp. Bo. of Sea, Laws. 176.

cules, to the North Seas; (v) and we have here therefore a full instance of Conventions entering into the composition, and forming part of the Law of Nations.

But one of the most remarkable public Deeds relating to Commerce, and in which the principles of Trade, and the rights of nations with respect to it, seem to have been best understood, is to be found in the famous letter of King EDWARD VI. translated into Greek and other languages, which was borne by Sir Hugh Willoughby and Richard Chancellor, two celebrated navigators, in their attempt to discover Cathaye in 1553.—After setting forth the disposition to cultivate the love and friendship of his kind, implanted by the Almighty in the heart of man, the consequent duty of all, according to their

(v) *Hæ et similes pænæque, imò graviores, ex constitutionibus vetustissimæ Urbis Visbúycensis, &c. repetentur.*

Tamen leges maritimæ et decisiones omnium controversiarum singularitur longe lateque usque ad columnas Herculis, & ultimum mare Scythicum ex ea petuntur & datæ observantur, &c. &c. Olaus Mag. L. 10. c. 16. They continue also according to Anderson to be observed to this day by the nations bordering on the Baltic. Hist. of Commerce, I. 179.

power,

power, to maintain and augment this desire, and the conduct of his ancestors in this respect which had ever been "to shew good affection to those who came to them from farre countries," the Letter proceeds in form to say :

"And if it be right and equity to shew such humanitie to all men, doubtlesse the same aught chiefly to be shewed to Marchants, who wandering about the world, search both the land and the sea, to carry such good and profitable things as are found in their countries, to remote regions and kingdomes, and again to bring from the same, such things as they find there commodious for their own countries : Both as well that the people to whom they goe, may not be destitute of such commodities as their countries bring not forth to them, as that also they may be partakers of such things whereof they abound. For the God of Heaven and Earth, greatly providing for mankinde, would not that all things should be found in one region, *to the ende that one should have need of another* ; that by this meanes friendship might be esta-

“ blished among all men, and every one
“ seeke to gratifie all. For the establishing
“ and furtherance of which universal amitie,
“ certaine men of our realme, moved here-
“ unto by the said desire, have instituted and
“ taken upon them a voyage by sea into farre
“ countries, to the intent that between our
“ people and them, a way may bee opened
“ to bring in and carry out marchandizes,
“ desiring us to further their enterprizes.
“ Who, assenting to their petition, have licensed
“ the right valiant and worthy SIR HUGH
“ WILLOUGHBY, Knight, &c. according to
“ their desire, to goe to countries, to them
“ heretofore unknown, as well to seeke sitch
“ things as we lacke, as also to carry unto
“ them from our regions, sitch things as they
“ lacke. So that hereby not only commoditie
“ may ensue both to them and us, but also
“ an indissoluble and perpetual league and
“ friendship, &c. We therefore desire you
“ Kings and Princes, and all other to whom
“ there is any power on Earth, to permit
“ unto these our servants, free passage by
“ your regions and dominions; for they shall
“ not touch any thing of yours unwilling
“ unto you.—Consider you, that they also
“ are

"are men. If therefore they shall stand in
 "neede of any thing, we desire you of all
 "humanitie, and for the nobilitie which is
 "in you, to aide and help them with such
 "things as they lacke.—Shewe yourselves
 "towards them, as you would that we and
 "our subjects should shewe ourselves towards
 "your servants, if at anie time they shall
 "passe by our regions." (w)

Such was the language of our ancestors two centuries and a half ago, than which the most enlightened and virtuous statesman of modern times, could not produce any thing more wise, more just, or more consonant to the truest ideas of the rights of Commerce.

The Commerce of the *Flemish* States which afterwards grew so famous, was early the object of regulation by Trade; and so far back as 1203, it was agreed by HENRY Duke of Lorraine, and THEODORICK Earl of Holland, that the merchants of each should have liberty of ingress and egress in their respective dominions, by land and by water; the mode by which their differences should

(w) Hackluyt. 3. 231, 232.

be settled, was prescribed in form; and they were bound not to require securities for their debts, till they had applied for justice to the Courts of the Towns where they happened to be, and were denied; in which case they were permitted to take securities. (x)

It was probably in consequence of the regularity introduced by such *Conventions*, that when the King of *France* had ordered the arrest of some English merchants and their goods within his territories in 1242, the transaction is blamed by *M. Paris* as contrary to old practice, and derogatory to the antient dignity of the kingdom. "Rex Francorum, Mercatorum Anglia corpora, cum suis bonis, per regnum negotiantium, *secus quam decuit* capi *feraliter* imperavit; *lædens inormiter* in hoc facto, *antiquam Gallie dignitatem.* (y)"

This arrest was upon the breaking out of a war; and nations had proceeded far towards regularity, considering the atrocities which

(x) Recueil des Traitez. 1. 43.

(y) Mat. Par. 585.

had so long distinguished them, when a conduct, mild in comparison to what had been the practice but a few years before, was talked of in such terms. The *antiqua Gallia dignitas*, suffered the same blot, so late as the year 1793, five centuries and a half afterwards, (z) and the custom of *Spain* on the breaking out of war, has been almost constantly the same; so that in this respect, we cannot be said to have advanced far beyond our ancestors. In 1528 we have a visible proof of the improvement introduced by Conventions into the commercial intercourse of States, in the protection which it was agreed to afford to one another's merchants upon the breaking out of war between Francis I. and the Emperor. It was afforded, according to the express language of the Plenary powers of the French Ambassadors, because many goods and merchandises belonging to the subjects of both of them remained mutually in their respective possessions, and therefore on account of the war, might be hostilely detained, to the great loss of the innocent

(z) When the Convention of France ordered the bodies and goods of the English Merchants once more *feraliter capi.*

owners; *immeritorum possessorum, nisi privatis eorum commodis mutuo, ut par est consulatur.* (a)

In the next year we have another instance of the protection of commerce, even during the height of hostilities between two countries; when HENRY VIII. and the EMPEROR, agreed upon a neutrality of the *Netherlands*, on account of the mutual sense they had of the benefits which each of them derived from Trade. (b)

These are at least some of the effects upon the interesting law before us, which as far as I have been able to discover, were brought about by positive *Conventions*; and in conjunction with those other causes which form the subject of the three last Chapters, they were the means of reducing the Western nation to a state of comparative regularity, from the frightful desolation occasioned by the Barbarians,

(a) Rymer, 14. 235. (b) Hume, 3. 164.

CHAP. XVI.

OF THE RANK AND CLAIMS OF THE NATIONS OF
EUROPE.

WE have in the last place to consider, according to our plan, the remarkable claims concerning their rank and privileges, which the Western nations were perpetually asserting; the principles which governed those claims; and the consequent regulations which were made by degrees, so as to enter into their Code of Law of Nations.

Possibly no part of law may to philosophers appear so frivolous as that of which we are now about to treat, which gravely endeavours to regulate what at best must be considered as mere vanities. The consciousness of worth, and the natural respect which is paid to power and merit, may be said, and with great truth, to be sufficient rewards of themselves alone, without involving ourselves in ridiculous and mortifying contests, to force them into higher public notice, and mark them

with a broader public stamp, than they would naturally obtain if left to themselves. The opinions, however, of philosophers, have always been long in acquiring such weight with the world, as to be able to correct its prejudices, and of all other prejudices, those which take hold of its pride and dignity. Accordingly, our ancestors gave themselves up, without even seeming to feel the folly of their conduct, to an immoderate and perpetual contest for rank and pre-eminence, often as destructive, as in general it was ridiculous!

Had they barely contended, the mention of the subject would not here be made; but as they contended with a shew and semblance of rights, and the gravest names affected to rest matters upon principles which have actually found a place in their Codes of Law; it is but a necessary consequence of our undertaking, to investigate the subject in form. In the same manner as an enquirer into the history of our municipal laws, although he might laugh at, or pity the ignorance which could gravely undertake to treat of *Witchcraft*, would be bound to review such laws and notions concerning it, as are known to have

4

existed,

existed: We must smile, however, to reflect that what, in the abstract, is in reality so trifling, and of such little genuine importance to the true interests of States, should be in fact one of the most difficult points to determine. The greater features of Europe, its superb Systems, the Assemblage of its Princes in Councils, and the whole train of its interests, may all of them be tolerably well made out, by an attention to facts and to principles. But the place which its different Sovereigns were supposed to hold in the scale of *Dignity*, and the rules which governed their claims to precedence, are so involved in obscurity from the dearth of clear and decided cases, and so liable to derangement from perpetual contentions, that the balance of power, or a nice case in morality, is more easily to be understood and decided, than a contest between the Ambassadors of two rival States, for the first place in the *Drawing Room* of a Sovereign. This is obviously owing to the same cause which renders all other cases of the Law of Nations difficult to settle; namely the want of a competent sovereign tribunal; for upon the broad common of Europe, the universal independence of its various States,

ren-

rendered the whole subservient to caprice, or to chance, according as the temporary power, the temporary obstinacy, or the temporary good humour of Kings and Councils might direct. Hence *Van Bynkershoek*, in mentioning this subject, confesses himself absolutely unable to decide upon the point, and asserts that the attempts of all others upon the matter have equally failed. (a)

When such an authority has renounced the undertaking, it is not our ambition to attempt it; but in pursuance of our plan, we shall content ourselves merely with stating what actually has been thought; and, when we are so lucky as to meet it, what actually has been decided by our ancestors.

Upon the simple question of rank, it should seem, beyond a possibility of doubt, that when nations are equally independent, they must all *originally* be equal in rights. And if a particular place or dignity, *to the exclusion of others*, is supposed (as it naturally must) to

(a) Quæst. Jur. Pub. L. 2. c. 9. *Bynkershoek* glances at Jacob Gothofred, who composed a long work called *Diatriba de Jure Præcedentiæ*,

be a *right*; no power on earth can be competent to say, *quoad* this point, which, among Independent Nations, are to be considered as superiour, and which, as inferiour; nor is it of any consequence, that one possesses a more numerous population, a greater extent of territory, or its Sovereign a higher founding title than another. Upon this part of the subject we may make use of Vattel's illustration, where he observes, that when the question is concerning the *rights* of Man, it matters not whether he be full grown, or only a *dwarf*. (b) As however the fact certainly is, that some Powers are more considerable than others in the great Society of the World, he confesses that the smaller ought to yield to the larger, not their equality of right, but when it can come into question, (as for example at a general Council or Congress) the mere *priority of place*, amongst equals. (c)

A great and proper deference for decency and order, no doubt drew this observation from *Vattel*, but I confess I do not see the

(b) Vattel, Prelim. 18.

(c) Id. 2. 3. 37.

justness of its foundation. In the intercourse of common and social life it certainly holds good, but wherever *Rights, Independence, and Equality*, are expressly to be represented, and *instituted forms* are in consequence to be fulfilled, it becomes even a very high *duty* in the Inferiour, to assert himself to the utmost point; it is "the ninth part of a hair" for which every man of spirit would cavil. Thus, in Popular Assemblies, or where the Representatives of a great Nation are met together, it would not only be far from indecent, but it would be even cowardice, and meanness, for the poorest member to wave his privileges as to equality of rank, because he met in the transaction of business, with some individual, more powerful or wealthy, *out of the Assembly*, than himself. But exclusive of this, and even upon the supposition that a State inferiour in power and wealth, ought, by the law of Europe, to yield to one superiour in these points; it is always difficult to make out that *superiority* in sufficient clearness; and, from the want of a competent Judge, should the contest be pushed with any perseverance, nothing short of actual trial, in other words, of actual war, can decide it. To say then
that

that the inferiour, *ought to yield the priority of place*, is to advance nothing *certain* with respect to the law and custom of precedence; or, what is worse, it is to advance what is calculated to inspire contending parties with additional obstinacy and hatred.

This assertion of Equality, however, by no means goes the length of a claim, to *superiority*. In the present day, contests of this kind have for the most part been laid asleep, either by a composition, begun long ago, which has brought on a mutual yielding; or, what is most usual, by a comparative abolition of those ceremonies where contests might arise. The time is not, however, long past, since the different Courts of Europe plunged into the warmest altercations on this account, and have quarrelled like madmen, or pouted like children, not because their *Equality* was invaded, but because their *pre-eminence* was not allowed. These contests were common to all States whatsoever, and so far were they from being peculiar to the most eminent for riches or power, that the smallest Sovereignities, according to *Bynkershoek*, "*ad ravim usque vociferantur et insaniunt*;" and the smaller

smaller the State, the greater the madness. (*d*) Certain it is that the precedency was so long considered of consequence by very grave men, that *Boreel*, an Ambassador of reputation and a Dutchman in the last century, writing to the accomplished *De Witt* concerning a contest between him and the Ambassador of *Savoy*, discovers much spleen against the Savoyard, whom he mentions as a petty Prince whose revenues do not amount to above 1,200,000 crowns, and proposes that *France* should be called upon to guaranty the rights and privileges of the Republic, among which he thinks its rank with respect to other nations is not the least. (*e*) So also, in the instructions given to Lord *Manchester*, when he went Ambassador to *Venice* in 1697, and to *France* in 1699, very particular injunctions are laid upon him, "that he take care to be "treated upon all public occasions, in the same "manner as the Ambassador of France and

(*d*) Quo minor est auctoritas qua nitaris, eo major infamia est. Quæst. Jur. Pub. L. 2. c. 9. He quotes the case of the Ambassadors of two Italian States, who meeting on a bridge at Prague where only one could pass at a time, remained all day on the spot because neither would give way to the other.

(*e*) Lettres de De Witt. 2. 384.

"Spain;" (f) in consequence of which, perhaps, it was, that when the Ambassador of *Portugal* had chosen to advance into M. de Torcy's room before his Lordship, he makes a public complaint of it both to the French Minister and his own Court, talks with littleness of *returning* his rudeness, and it is made the subject of four or five letters, in which the Ambassador, the Secretary of State, and King William himself, take part before it is settled.

It is inconceivable into what importance these trifles used sometimes to swell, so as to become of consequence to the most material interests of whole kingdoms. About the year 1600, the long wars of Elizabeth, and King Philip of Spain, drawing towards a conclusion, commissioners met on both sides for the settlement of a peace at *Boulogne*; but although each of the parties appeared in earnest, yet, from the moment of their arrival, difficulties were started concerning the *precedency*, and those difficulties were never got over. The *Spaniards*, who, a century and a half before this, had been divided into a number of petty states, had almost con-

(f) Coles Mem. of Aff. of State, 232.

stantly yielded the point to the *English*. But the great and almost sudden power of their monarchy, arising from the fortune of CHARLES V. had induced his son to start pretensions to the precedence of all the Powers of Europe. In pursuance of this, the Spanish Ambassadors insisted that the conferences should be held at their lodging; but they were told by the English, that the Queen might as well have sent them to treat in their very country, which they knew had been refused; and Sir Thomas Edmonds, whose reputation was high among the statesmen of that time, observes in a letter to Secretary Cecil, that they were resolved "not to yeald, or to give away anie jotte of her Majestie's honour." The *English* Privy Council offered *equality*, or to get rid of the matter "by some way of indifferency, without priority to either;" but it was refused by the *Spaniards*; and the high-spirited ELIZABETH being thus provoked, affirmed "that she would never do herself that wronge, as to yeald in that poynt any manner of superiority; being resolved as soon to keep her sword drawn for the maintenance of her honour, as for her possessions." The Spaniard continuing immoveable, she desired "that they
" might

“ might roundly be told her resolution ; so
“ that however the action might stand or fall,
“ they might not go away with any note or
“ opinion of having been more resolute on
“ the matter than herself.” Accordingly, (*g*)
the whole treaty went off upon it ; nor was
the peace finally settled till some years after-
wards, under a more pacific successor.

In the conduct of this dispute, much enquiry, as it may be supposed, was made into the matters and arguments fit to be adduced in support of the dignity of nations. They were the subjects of many of the letters between the Ambassadors and the Privy Council of England ; and *Sir Robert Cotton*, the celebrated antiquary, was employed to draw up what he called “ A Briefe Abstract of the
“ Question of Precedency between England
“ and Spaine.” With the force of his reasoning, as it related exclusively to the two nations, we are not here particularly concerned ; but his arguments, as they related to *all* European nations whatsoever, it may not be improper to state.

(*g*) Winwood's Memorials. 1. 203. 204. 222.

He divides, then, the precedency of Kings into that of Place and Person. The first is made to depend upon two circumstances; upon antiquity, as a kingdom, (which is again subdivided into antiquity as a *Christian* Kingdom,) and upon eminency of the Throne Royal. The last is also subdivided into the nobility of the blood of the reigning family, and the antiquity of their government; (*b*) thus:

Precedency of a King, in respect of	Place	{	Antiquity	{	Kingdom, or a
			as a		Christian King-
	Person.	{			dom:
					or
					Eminency of the Throne Royal.
					Nobility of Blood,
					or
					Antiquity of Government.

I. Concerning the first point, namely, of **ANTIQUITY**; there is nothing in this which is not a very general prejudice among all nations, the origin of almost every people who boast themselves *original*, being carried beyond the power of record into tradition and fable, and ending, for the most part, with the commencement of things, or with the Gods themselves. Thus, not to go into ancient Europe, the Scandinavians derived their

(*b*) Cotton. M. S. preserved in the Harleian Manuscripts.

Origin from a celestial founder in ODIN; (i) the Germans from a God called TUISTON, or the Son of the Earth; (whence the country was antiently called *Twitsch*, *Deutsch*, and *Deutschland*); (j) and the English from BRUTUS the Trojan, (k) and BRENNUS the Gaul; (l) the first of which was actually pleaded with great gravity by EDWARD I. when he claimed the sovereignty of Scotland, in a letter to Pope Boniface VIII. (m)

And hence, nearly all writers on this subject have concurred in a maxim as true, “Bonum quo antiquius, eo melius;” (n) than which, perhaps, upon investigation, none will be found to be so little supported by good sense.

With respect to the priority of conversion to *Christianity*, almost all the writers concur

(i) Edda ap. North. Antiq.

(j) Pfeffel. Dr. Pub. D’Allem. i. 2.

(k) See the whole question seriously debated in Milton’s Hist. of Eng. B. i.

(l) Howel on Preced. 23.

(m) Du Mont. Corps Diplom. i. 322.

(n) Howel. 149.

in acknowledging it as a very weighty reason for precedency, (o) few or none having ventured to call it in question, except *Sir George Mackenzie*, who had the honour of Scotland to support. (p) It is remarkable, however, that *Grotius*, though he acknowledges it in his Treatise, fell so far into these prejudices, as to deny it afterwards, when, as an Ambassador, it militated against himself. Being at *Paris* in 1637, on the part of *Sweden*, a contest for the first place in a cavalcade at the reception of the Dutch minister, arose between him and the *Earl of Leicester*, Ambassador of England. The matter being first fought for with the sword, in which the English had the advantage, was afterwards debated with the pen; and Lord *Leicester* urging the priority of conversion in his nation, *Grotius* refused to allow the force of the reason; alleging, in the very spirit of altercation, that if such an argument were allowed, it might prevent the conversion of

(o) Gothofred. De Jur. Præced. c. 3. n. 23. Grot. D. J. B. et P. 2, 5, 22. Howel. 9, 10, 11.

(p) Mackenz, Laws and Cust. of Nat. as to Preced. 6.

Pagans and *Mahometans* to *Christianity*. (q) To such streights are, sometimes, even the wisest and most philosophical minds reduced, and thus liable are they to be governed by the very prejudices which they wish to despise. In the ceremonial, however, of the Pope's chapel at *Rome*, where all the Sovereigns of Europe had their places assigned them with particular functions, the point is firmly settled, and forms the chief and almost only guide in arranging the precedence. In all great assemblies also, which were held under ecclesiastical authority, in which the same Sovereigns assisted, such as synods and councils, the same governing principles of course prevailed. Hence, in the contest at *Bologne*, above-mentioned, it was pleaded by the English Ambassadors, that at the councils at *Constance*, *Pisa*, and *Sienna*, their place was next to the *Emperor* on the left hand, the Spaniard not contesting it till the council of *Basil* in 1431; (r) and that after a long dispute between the Kings of *England* and *Spain*, inter

(q) Vie de Grot. par Burigny. i. 394, 5, 6. There is there a detailed account of a contest for precedence, in which the arguments are as good as the subject will admit.

(r) Cotton. M. S. Quest. of Preced.

Sacra de sedendo, it was determined by Pope JULIUS II. *pro tempore*, in favour of England. (s)

With respect to the other division of *Place* namely, *Eminency of the Throne Royal*, it is made to consist, by *Cotton*, in "the absolute-ness of authoritie political," by which he means an absolute independence of all superiority, as Lords Paramount; on the absoluteness of authoritie ecclesiastical, by which he means independence of the See of Rome, even among Catholics; and on the Eminency of the Royal Dignity; by which he means, generally, any thing that adds to the splendour of Monarchs; such as the titles they have borne; their feudal superiority over other subordinate kingdoms; their being marked out, as it were, to derive their power from divine right, by receiving the Sacred Unction, an honour formerly only enjoyed by four, (t) and the superiour antiquity of that honour; to which, to the reputation of England, he adds, with much gravity, the cure of the *King's Evil* as a peculiar sign of the favour of Heaven.

(s) Winwood's Memoir. I. 196.

(t) Germany, France, England, and Spain.

II. As to the first subdivision of precedence in respect of *Person*, namely, “the *Nobility of Blood*,” it is very strenuously insisted upon by other writers besides *Cotton*; particularly *Sir George Mackenzie*, and *Howel*, who enumerate the various exploits of a King’s ancestors as a reason for their taking rank of others less known and remembered. (u) Hence the battles of *Cressy*, *Poitiers*, and *Agincourt*, are pleaded on behalf of the Kings of England; and at the famous Council of *Trent*, where there arose many contests for rank, and the nobility of Princes came often into question, it was pleaded by *Bavaria* against *Venice*, that it had antiently enjoyed the *Electoral* Dignity; and by *Savoy* against *Mantua*, that its house was infinitely more illustrious, and had been honoured with the title of Highness. (v)

As to the second sub-division of *Person*, namely, the antiquity of the government of the reigning family, it has provoked much contest from the Jurists. *Mackenzie* having

(u) *Howel* on Preced. 38. 43.

(v) *Wicquefort*. De L’Ambass. L. i. S. 25.

Scotland expressly in his view, rests upon it almost entirely, in preference to all the rest. "No rank, says he, can be acclaimed by a country, *as such*, because all countries were created at the same time, *and none can know which was first inhabited*; neither can it be claimed by priority of conversion to Christianity; for Christianity rather discharges all care for precedency; nor by the decisions of councils of churchmen, who always preferred those who were best able to do them service. It is the *antiquity of the family alone*, that can decide it. Even custom, (consuetude,) he goes on to state, cannot change this part of the law, which was in order to secure the public peace and interest of mankind; and it is not therefore to be overthrown by the partiality of churchmen, or the pride and power of other *Competing* and rival Princes: nor can such precedency, in the opinion of the antient Jurists, be waved, even by express paction; since, though it may seem that every man may renounce that which is understood in his own favour; yet he cannot renounce it when it is *not* principally introduced for his own sake, but for the sake of the common interest

terest of mankind, *by the Laws of Nature and Nations.*" (w)

Thus far the Scottish civilian, who with very honest partiality concludes, that the King of Great Britain may claim the precedency of all other Kings, *inasmuch as that he is properly King of Scotland.* (x) On the other hand, it is cogently shewn by *Grotius* and *Vattel*, that it is the weight and independence of the people themselves, not the mere duration of the empire of the reigning family, which determine what is due to their rank and place. The sovereignty of the nation, say they, continues the same, whatever alteration may be made in the form of that sovereignty; and all its duties are still to be fulfilled where they are owing, although not only the *Person* of the Governor, but the Government itself, is annihilated. Its rights are therefore also in force, and ought equally to be exacted. Hence when England altered its form of government under *Cromwell*, the alteration made no difference in its rank among other states;

(w) *Laws and Cust. of Nat. as to Preced.* 5, 7.

(x) *Id.* 3.

and

and that hardy usurper, however low himself in point of dignity, demanded, and actually received, the same honours which had been paid to its Kings. (y)

Upon the whole, however, *Antiquity*, generally speaking, and without having reference to the family in preference to the nation, or to the nation in preference to the family, seems the fairest reason for rank; fairer even than riches and power: for these, as has been observed, among independent states, or persons who are equal in rights, ought not to weigh any thing: whereas even where they are equal in rights, it seems but natural that he who was first received into an order, should chuse his place; a circumstance which is daily exhibited in common life, where we observe that in all public bodies, the member who is first admitted, generally takes the lead as to place; nor is there any thing more common, where all other pretensions are equal, than for seniority to determine it. And hence an old constitution of *Theodosius*

(y) Grot. D. J. B. et P. 2. 9. 8. Vattel. 2. 3. 17, 18.

and *Valens*, is mentioned with approbation by *Grotius*; (z) in which it is laid down, that amongst those who possess the *same* rank, he who *first* came to be possessed of it, ought to take the lead.

And so much with respect to Antiquity, as conferring a right to pre-eminence among the states of Europe. Other arguments, however, have found their advocates, of which some may be thought to be of weight, though some are mere redundancies. Thus *Vasquez*, a civilian of renown, and Ambassador from Spain to the Council of Trent, where a very solemn contest arose between *France* and *Spain*, adduced in support of his master “ the
 “ Antiquity of the Catholic Religion in his
 “ country; that the first *Christian* church
 “ was built, and the first council celebrated
 “ there; that he was King of *Jerusalem*, which
 “ by its sacredness ought to take rank of all
 “ others; that he possessed subjects of great
 “ nobility and goodness; that he was superior to others in riches; that he had
 “ greater reputation, and possessed larger

(z) D. J. B. et P. 2, 5, 21.

“ means

“ means of bestowing benefits upon the
 “ world, from his extensive commerce.” (a)
 The French, on the other hand, pleaded the
 nobleness of their kingdom, which possessed
 so pure an air, that the moment a slave set
 foot in it, he became free ; the strength of
 their government ; their exploits in war ; the
absoluteness of their King, and the title of
 “ Most Christian,” which had been bestowed
 upon him. (b) To these have been added,
 for other Kings, the number and goodness of
 cities ; the soundness of laws ; the succession
 of *legal* Sovereigns, as contradistinguished
 from *tyrants* ; (c) the grandeur and hospita-
 lity of courts. (d) In a contest between Den-

(a) Wicquef. De l'Ambass, ut sup. Howel. 138.

(b) De Callieres Man. de Negoc. 1. 315. Howel. 99.
 Wicquef. ut sup.

(c) Mackenzie. 6.

(d) Howel. 35. 45. 74. 85. It is curious to remark how
 far a man may be carried in support of a favourite point.
 This last author, amidst various matter which may appear
 of consequence, adduces, for Great Britain, the quantity
 of snow “ which, like a gentle white rug, doth cover the
 “ ploughed fields ;” the immense plenty of beef, mutton,
 and veal, which was furnished for the royal tables, and the
 circumstance that the Yeomen live like Gentlemen ; the
 Gentlemen like Noblemen ; the Noblemen like Princes,
 and the Lord Mayor and Sheriffs like Kings.” P. 46, 47.

mark

mark and Sweden, at the Council of *Bafil*, the Archbishop of *Upsal* claimed precedency for his master, before all the Sovereigns of Europe, as successor of the Gothic Kings, who had exacted tributes from the Emperors and Kings of France ; (e) while, in opposition to this, Denmark demanded pre-eminence, because it formed one of the states of the empire.

And thus, we may observe, that every state, while contending for this high and delicate point, has brought forward every sort of argument, however weighty, or however trivial, which could apply exclusively to itself ; nor, had we nothing more to guide us, could we possibly say what it was that determined it. Even as it is, we can arrive at little certainty ; and we must content ourselves, therefore, with the little that seems to have been confessed, and the few cases of priority that have actually been decided.

Amongst these, the first that strikes us, is that uniform and uncontested pre-eminence

(e) Vie de Grot. par Burign. i. 387.

which was allowed to the Sovereign Pontiff of Rome; whose *spiritual* power, by giving him the title of THE FATHER OF CHRISTENDOM, naturally threw around him a superiour awfulness and majesty, and procured him, without opposition, a veneration to which none other could pretend. We have in a former chapter (f) entered somewhat at length into that remarkable part of the constitution of Europe, by which the POPE was considered as the Director of all Christian Sovereigns; and from what was then said, it would appear, that a Power which was invested with such stupendous and real authority and influence, would claim, and receive, as a mere natural consequence, the very first rank in all circumstances where a comparison of rank could arise. Accordingly, his pre-eminence, before the division of the Church, by the Reformation, was so far from being contested, that the greatest Princes submitted to the performance of offices even menial about his person, and to the well-known humiliation of kissing his foot; which, for the sake of him whom he was supposed to represent, they chearfully allowed. Thus, in the ceremonial of Rome,

(f) Chap. XIII.

the

the Ambassadors of the various Sovereigns had their places and duties regularly marked out; such as the bearing of his train, or of his hood, and the delivery of the Chalice. The canon law affirms, that so early as the time of CONSTANTINE the Great, the Emperors held the bridle of his horse in the procession, which was allowed ever after, with very few exceptions, and his place at the chapel was decided to be no higher than his footstool. (g)

Consistent also with the principle which inculcated these humiliations, the embassies to Rome were always considered more as a mark of submission to that court, than as a matter of business. They were generally conducted with the greatest splendour, and conferred upon noblemen of the highest quality, whose titles of Ambassadors of *obedience* emphatically marked their designation. Such embassies were expected from all the states of Europe, and were almost universally sent; and so uniformly was the doctrine inculcated, that when the missionaries in the East had converted some nations of *Japan* to CHRISTIANITY, they exhibited a decisive proof of it in three

(g) Mackenz. 29.

embassies of obedience which were sent by their Kings to Rome in 1575, by which the Pontiff was addressed as "the *Adorable*, who " holds the place of the King of Heaven upon " Earth." (b) From all this it necessarily followed, that the Pope's Ambassadors, wherever they appeared, took rank of the Ambassadors of all other Sovereigns. They went under the appellation of *Nuncios*, which was particular to themselves; and in conformity with the supposed subject of their mission, they have sometimes been called Angels of Peace. (i)

But the influence of the Church, with respect to precedence, did not stop here. That sanctity which the *spiritual* character was supposed to confer, extended itself to all who were invested with it; and *Churchmen*, with a deference in the Laity, which is strictly proper, were allowed to precede on all occasions. In the higher ranks, however, this arose to a point which is almost inconceivable, and can only be explained upon principles peculiar to

(b) Voltaire. *Espr. des Nat.* 5. 203.

(i) As at Trent, in 1544. *Fr. Paol. L.* 2.

the ecclesiastical polity of Europe. As the POPE was allowed without contest to be the head of the *Christian* world, it was presumed by the zealous supporters of his authority, that the *Cardinals*, who were nearest to him in dignity, and whose authority could only emanate from his own, enjoyed a rank and place in the estimation of men to which even some Sovereigns could not aspire. They therefore often claimed, and sometimes actually obtained the precedence of Kings themselves. Thus by the ordinance of *Sixtus V.* it was settled in the ceremonial of Rome, that if Kings and Cardinals met together at table, or other solemnities, the first place should be enjoyed by the first Cardinal Bishop, the second by a King, the third by a Cardinal, and so on alternately. (j) A distinction, however, seems to have been made by some statesmen between Kings that were hereditary and those who were only *elective*; the pre-eminence of Cardinals being enjoyed, as it should seem according to them, only with respect to the latter. Thus, when Lord *Nottingham*, in his splendid embassy to Spain,

(j) Mackenz. 30.

1604, solicited to dine with the King, he was given to understand, by the Minister, *Oliver*, and the Constable of Castile, that it was directly against the ceremonial; and that the Pope's Nuncio himself, "*who being by his degree a Cardinal, was to take place of some Kings that were elected, and not hereditary, had never been admitted to that honour (k.)*" In compliance with these prejudices, many inferior Sovereigns, such as the Duke of Saxe Weimar (*l*) have yielded in rank to them; and PHILIP II. himself, when Prince of Spain, though son to the *Emperor*, was contented to be treated as an equal. (*m*)

The second great point which seemed to be settled in the ceremonial of Europe, was the precedence of the KING OF GERMANY, EMPEROR OF THE ROMANS, or, as he is often inaccurately called, the EMPEROR OF GERMANY.

There were of old, very warm contests in the Courts and Chanceries of Princes, concern-

(*k*) Winwood. 2. 70.

(*l*) Mem. touch. les Ambassad. 80.

(*m*) Wicquef. p. 265.

ing the relations which the titles of King and Emperor have to each other; the Monarchs who were honoured with the latter, concluding that it was far superiour to the former. This distinction arose from the pre-eminence claimed by the Emperors of the *East* and *West*, who shared the old Roman dominions over the various tribes of Gothic Kings or leaders, who by degrees destroyed them. Accustomed to the most splendid ensigns of dignity, and, for a great length of time, to a superiority immense and uncontested over any single King that came within the sphere of their intercourse; even enjoying, besides, the tribute and homage of almost all who surrounded them, they saw their precedency confessed and submitted to by the rest of the world. As, therefore, the other nations broke in upon them by degrees, and it was by intervals that they parted with the provinces which composed their dominion, it was not unreasonable for them to continue to affect the antient pre-eminence, of which they had so long been *legally* possessed; and as the Scandinavian Chiefs who established themselves one after another upon their territories were known by the title of *Kings*, they pre-

tended to preserve a difference between that and their own designation of *Emperor*.

In reality, however, as has been learnedly shewn by *Selden*, the difference there was between them, was, if any thing, in favour of the *Kings*, the word *Emperor* signifying no more than the leader of an army, with which, modest as it comparatively was, the antient Roman despots were obliged to content themselves, from the hatred which they knew to be borne by the people to the word *King*. At the same time it may be right in this place to enquire a little into the real significations of this latter denomination, as it may be of consequence in the elucidation of several of the customs of Europe which we are about to enumerate, and which, from seeming difficulty, were often attended with much confusion and dispute.

The word *King*, then, in the abstract, can be considered merely as a general denomination or title, conveying the idea of command and pre-eminence over others, but which may admit of various gradations, and be invested with

with very different prerogatives. The Heads of numberless petty nations have often been called by this denomination, and I think inaccurately so, unless we admit of this division. Thus, the Chiefs of different tribes of men, that have been met with in voyages of discovery, are often and loosely called *Kings*. The Chiefs of antient *Gaul*, *Germany*, and *Britain*, are so called by *Cæsar*, who in the single province of *Kent* enumerates four persons dignified by the title of *Reges*. (n) The leaders of various Celtic and Scandinavian hordes, who settled themselves in Scotland, Ireland, and the Isles, preserved for a long time this splendid appellation, which, with respect to the Isle of *Man*, existed even in our own memory. (o) In some countries it has also been given even to the *Sons* of the King, as a mere augmentation of their dignity, without carrying along with it any of that

(n) De Bell. Gall. 5. 22.

(o) In antient Britain these inferiour Kings were in such plenty, that the Paramount EDGAR obliged eight of them to row him in his barge upon the river Dee. Chron. Brompt. apud Twyſden, 864.

authority with which in general it is invested; as was the case in the antient Constantinopolitan Court, and, during very early times, in Spain; (p) and it may be said to continue to this day in the Empire, where the apparent successor is called King of the Romans.

But without troubling ourselves with enquiring into the nature of the sovereignty of all who have borne the title, we may, for the most part, follow the general sense of the division which Lord Coke has made of it, into Kings independent and paramount, and those who are subordinate to them. "The regal Estate and Dignity of a King," says that learned writer, "are of two manners; the one is Imperial, or Supreme; who owes no mean feignorie, or attendancie of corporale or bodily service, or allegiance, to any other worldly Prince or Potentate, and from whose sentence there is no appeal. There is also a King, and he a *Homager* or *Feudatory* to the Estate and Majesty of another King, as to his superiour Lord,

(p) Selden. Titles of Hon. Ch. 3.

" The King, which is supreme and imperial,
 " *is equivalent within his land to the power and*
 " *authority that Cæsar can challenge within his*
 " *own dominions*; and such a King challengeth,
 " of right, to set upon his head a crown Im-
 " perial, with a diademe elevated on high,
 " to signify the perfection of greatness of their
 " estate: but to the other Kings, *homagers*,
 " a crown not elevated is due." (q)

This division of Kings, into *Homagers*, and *Paramount*, was however not well understood in Europe in very antient times, and the confusion which was made of the two dignities, will serve to explain the reason for the assertion of several absurd and ridiculous pretensions, in the old Emperors of the East and West. Many Chiefs of nations, having been confessedly *tributaries*, or *homagers*, as we may call them, to the antient and integral Roman Empire, its Supreme Monarch who was called *Imperator*, conceived that there was a wide difference between their appellations and his own; and although a division was made of the *Eastern* and *Western* Empires, yet the

(q) Fourth Instit. 343.

Sceptres of both being still considered as *Roman* Sceptres, and as such pre-eminent over others; the Sovereigns who swayed them continued to preserve the distinction. Nor was it of any consequence that the Despot of the *East* changed his appellation of Emperor for that of *Αὐτοκράτωρ* and *Βασιλεὺς*, for as they were equivalent in the language of the country to the old one of *Imperator*, the same distance was supposed to be preserved between him and the surrounding *Kings*.

This pre-eminence, however, was warmly contested by the sturdy conquerors of the Princes who affected thus to degrade them; and being no longer *Kings Homagers*, many of them assumed the same style with the Emperors, both of the *East* and of the *West*; calling themselves by the titles of *King*, *Imperator*, or *Basileus*, as their fancy directed. Thus the Saxon EDGAR was styled frequently in his charters, “*Albionis et Anglorum, Basileus*,” and in one to Oswald, Bishop of Worcester, he is called “*Anglorum Basileus, omniumque Regum Insularum, Oceanique Britanniam Circumjacentis, &c. Dominus et*”

“*Im-*”

"*Imperator.*" (r) So also WILLIAM RUFUS, when he had quarrelled with Anselm, Archbishop of Canterbury, *who appealed to the Pope*, finding that the Emperor HENRY V. claimed to nominate another Pope *in virtue of his Imperial power*, asserted immediately that no Archbishop or Bishop of his kingdom could be subject to the Pope, *the King having the same power within his kingdom as the Emperor possessed within the Empire.* (s) The idea is continued in the time of HENRY VIII. it being declared by a Statute of one of his Parliaments, "that by divers and sundry old authentic histories and chronicles, it is manifestly declared and expressed, that this realm of England is an *Empire*, and so hath been accepted in the world, governed by one supreme head and King, having the dignity and royal estate of the *Imperial Crown* of the same." (t) A similar sense is evinced by the words of the Act of an Irish Parliament of the same King, in which the Kings of England are called, "Kings and

(r) Selden. Tit. of Hon. Part 1, ch. 5.

(s) Mat. Par. 19.

(t) 24 Hen. VIII. c. 12, See Lord Coke's reasoning upon it, 4th Inst. 342.

"*Emperors* of the realm of England, and of "the land of Ireland;" (*u*) and by other Statutes of Elizabeth and of James. (*w*). All this shews that the English have had as high an idea of the power, state and dignity of their crown, as that of any cotemporary Monarch, under whatsoever appellation denominated; nor will it be incurious or irrelevant to remark, that even the Protector *Cromwell*, in 1654, was reported on the Continent to have been declared, "Oliver, the "first EMPEROR of Great Britain, and the "Isles thereunto belonging, always Cæsar," &c. (*x*)

The French had a like idea of the dignity of their Crown; and when, upon their great contest with Spain for Precedency at Trent, in the sixteenth century, the Spanish party hinted that their Master was upon the point of obtaining from the Pope, the title of EMPEROR of the INDIES; the French Ambassador *Lansac* answered, that that title would make no alteration in the state of the

(*u*) Selden ut sup.

(*w*) 1. Eliz. c. 1. 1. Jac. c. 1.

(*x*) Thurloe's State Pap. 2. 614.

affair,

affair, nor oblige "the EMPEROR of FRANCE" to yield to them one moment the sooner. (y) In various old charters the King of Spain also is styled "Disponente Deo, Hesperiaæ Imperator," and "Dei nutu Hispaniaæ Imperator, una cum conjugè Imperatrice." Alphonso IX. of Castile, defining what *Kings* are, asserts that they are placed over their people to govern them in their kingdom, "Bien assi comme el Emperador en suo Imperio;" and hence the city of *Toledo*, being the chief city, is termed "Cabeca del Imperio del España," and assumes in consequence, for its arms, the image of an Emperor in his Imperial habit. (z) The same dignity is also claimed and enjoyed without any pre-eminence or authority over other Kings by the *Tzar*, or *Czar* of the *Russias*, which signifies nothing more than *Great Duke*, (a) but the affinity of which to *Cæsar*, has induced many to believe that it is exactly the same dignity with that assumed by the Roman Emperors.

Upon the whole then, it will follow that there is no pre-eminence naturally and intrin-

(y) Wicquefort. L. i. S. 24. (z) Selden ut Sup.

(a) Lord Carlisle's Embassy to Russia, Temp. Jac.

sically attached to the name of *Emperor*, over that of *King*; and that if the Sovereign of Germany enjoyed, or enjoys the Precedency of other Monarchs, it is not in virtue of his being an *Emperor*, (a title which any independent Sovereign might, or may assume,) but in consequence of some other accident of his Crown.

This accident, (if I may so call it) was his succession to the *Roman Sceptre*, as swayed by the Western Emperors, which every body knows took place under Charlemagne, who in the year 800, "*Imperato in Æde sacra à Leone pontifice et civibus Romanis festiva acclamatione salutatus est, ROMANORUM IMPERATOR AUGUSTUS.*" (b)

Upon this celebrated transaction there arose among the European nations, two very important questions.

I. Whether the old Western Roman Empire really revived in the person of Charlemagne?

(b) Conringius De Imp. Rom. Germ. S. 17. See also Baron. Annal. Sigonius de Regn. Ital. ad ann. 800. Struvius Corp. Hist. Germ. Per. 4. Sec. 1. 33, 34.

II. If

II. If it did, what rights were renovated with the Imperial Title? To which we in modern times may add a third; namely, What affinity there was between the *kingdom* of Germany and the Roman Empire, so as that the Monarchs of the one are ipso facto Sovereigns of the other?

Concerning the first of these questions, it seems to have been settled on all sides, that the transaction at Rome in the year 800, was a legal renovation of that magnificent Empire which had for so many ages governed the European world; and throughout the histories, we accordingly find the conqueror of Lombardy, and deliverer of Rome, mentioned as the successor of the Western Cæsars. This succession is grounded upon the following reasoning; That throughout all the revolutions which the Empire underwent, and however absorbed its various provinces might have been by various other nations, still the *Roman People* continued the same, and a part of them having recovered their liberty by the march of CHARLEMAGNE across the Alps, they could proceed to the *legal* exercise of all their old rights: That among these rights,
that

that of electing the EMPEROR was confessed, and therefore although the fortune of different conquerors might for a time have prevented them from exercising it, yet when the restraint under which they had laboured was taken off, they returned to it by a kind of Postliminium: That the first use they made of it was to invest their Deliverer with the Imperial Power, who thus, *by an Election of Roman Citizens*, became the Sovereign of all that was left of the Empire, and together with the Sovereignty assumed the Imperial Title. (c)

With respect to the second question, namely, what rights were renovated with the renovation of the Imperial Title, there was formerly much more difficulty than in determining the first. The old Empire had been completely dismembered, and so strong a pre-

(c) Great part of the reasoning is in Grotius, 2. 9. 11. Pfeffel, Dr. Pub. D'Allem. 1. 37. contents himself with saying, that the old Western Empire revived. Putter, 1, 6. with a discussion of the rights actually assumed by Charlemagne, not the right of the people to confer them. The reasoning is liable to a variety of observations, but as the question is only concerning what was actually allowed by the world, it is needless to enter upon them.

scription

scription could be pleaded against any claim that might be set up concerning the antient provinces that had been torn from it, that the advantages which CHARLEMAGNE acquired, could only be said to extend to the *Imperial title*, and those fragments in Italy which at that time might be thought to compose the Roman State, and which latter he had before been thought to have obtained in quality of *Patrician* of Rome. (d) Nevertheless, as it remarkably happened that this conqueror was personally in possession of a great proportion of the antient Empire, (the fruits either of his sword, or of peaceable succession) and the antient dominions came thus adventitiously to be governed by him who bore the antient title; a jumble was made by many of the Civilians in after times concerning these two points, and it was inculcated, that not only the Imperial Title, but the Imperial power and prerogatives *over all the old kingdoms which had composed the Empire*, had revived in Charlemagne and his successors. Hence, *Sigonius* in his account of the election

(d) Quare etiam Scriptores adserere non dubitant, *Carolum*, Romam, antequam Imperator fieret, suis sceptris addidisse Struv. Corp. 4. 1. 26.

of CHARLEMAGNE asserts, that that Monarch
 “ officio suo convenire est arbitratus, ut Ita-
 “ liam, atque universam Christianam Rem-
 “ publicam ordinaret.” (e) Hence also, when
 the OTHOS, in the tenth and eleventh cen-
 turies, had possessed themselves of this great
 dignity, they imagined they could exercise a
 certain Sovereignty over foreign Kings, as well
 as over the Princes of *Germany*; and the idea
 was spread abroad, that as the whole of
Christendom, considered as an ecclesiastical
 society, had one visible *spiritual* head, which
 was the Bishop of Rome; so also, in con-
 formity with antient prerogatives, they ought
 to obey one *temporal* head, which was the
Roman Emperor. (f) Foreign kingdoms were
 therefore called upon to acknowledge a degree
 of supremacy in the Germanic Emperor,
 which was actually complied with by *Den-*
mark, *Poland*, and *Hungary*; (g) and which
 also, as the Emperors have boasted, was al-
 lowed by *Spain*, *France*, and *England*. (h)

(e) Sigonius De Reg. Ital. L. 4.

(f) Putter. 2. 3. Martens Precis du D. des Gens. 1. 25.

(g) Putter. Ib. Pfeffel, however, says, this was in right
 of conquest with respect to Hungary. Dr. Pub. D'Allem.
 1. 212. 216.

(h) Putter ut sup.

Certain

Certain it is that the Emperor SIGISMUND, while in France, sat in the royal seat in a full parliament there, and exercised an act of Sovereignty in knighting the Seneschal of Beaucaille; and HENRY II. of England, writing to FREDERICK BARBAROSSA, has these most remarkable expressions. “Regnum nostrum, “et quicquid ubique nostræ subjicitur ditioni, “vobis exponimus, et vestræ committimus “potestati, *ut ad vestrum nutum, omnia disponantur; et in omnibus vestri stat voluntas Imperii.* Sit igitur inter nos et populos “nostros, dilectionis et pacis, unitas indivisa, “commercia tuta: ita tamen *ut vobis qui dignitate preminetis, imperandi cedat auctoritas, “nobis non deerit voluntas obsequendi.*” (i) RICHARD I. also is said by Hoveden to have deposed himself from his kingdom of England, et tradidit illud Imperatori (Hen. VI.) sicut Univerforum Domino. Selden, reasoning upon this incident, observes that this was done under *duress*, and that the right was *released* by the Emperor before his death. (j) But

(i) Lyttelt. Hen. II. Append. No. 5. Selden, with more indifference than is usual with him, endeavours to get rid of this, by saying it is a mere letter of compliment. Tit. of Hon. ch. 2.

(j) Id. Ib.

although this is a fair plea with respect to *Richard's* Sovereignty over *England*, there was no occasion, while delivering up his kingdom, to add even under *duress*, Sicut Univerforum Domino, unless such had been the Emperor's pretensions in those times.

Another, and a stronger proof of these pretensions, may be drawn from the Emperor's power of creating *Notaries*, (at that time a kind of *Magistrate* acknowledged by the old civil law,) in kingdoms which were otherwise perfectly independent of his jurisdiction; and the existence of this privilege, may be shewn from the very endeavour to get rid of it. *Selden* infers much from the circumstance that in the elder times, Public Notaries who enjoyed their authority either from the Pope or Emperor, were not at all, or were *rarely* admitted in any use in *this* kingdom. Lord *Coke* goes farther, in saying that they claimed *de jure* to exercise their offices here in *England*; but because it was against the dignity of a supreme King, they were prohibited by the King's writ. But other kingdoms were forced to make express laws in order to assert the supremacy of their Monarchs in this particular.

ticular, which in *Scotland* was done so late as the time of JAMES III. by an Act of Parliament which seems fairly to acknowledge the existence of the prerogative.—It enacts, “That our Soverain Lord has full jurisdiction and free Empire within this Realm;” “that his Hienesse may make Notaries and” “Tabelliones, qua his instruments shall have” “full faith in all causes and contracts within” “the Realm; and in time to come, that na” “Notary maid, or to be maid, by the Em-” “peror’s autoritie, have faith in contract civil” “within the Realm, *lesse then he be examined*” “*by the Ordinar, and apprieved by the King’s*” “*Hienesse.*” (k)

It is wonderful how high these ideas of the Imperial prerogatives in Europe were for a long time carried; *Julius Firmicus*, an old author, (l) affirms with respect to them, that “Totius orbis Terrarum spatium, Imperatoris” “subjacet potestatibus.” Some of the coins of the old Emperors have borne the inscription, *Victor Omnium, Gentium*; and a grave confutation of this is entered upon by *Selden*, and by *Duck*, to prove their little claim to

(k) 5 Jac 3. c. 3. ap Seld. Ib.

(l) Ap. Seld. Ib.

this splendid title. (*m*) Certain it is that *Bartolus*, a very learned Civilian, who has been called, *Magnum Jurisconsultorum lumen*, (*n*) asserted that this great Potentate was Lord of the world; (*o*) a position which, it should seem, was foolishly founded on those hyperbolic expressions concerning the "*Orbis Romanus*;" and "*Orbem jam totum Vic-*"
tor Romanus habebat," to be met with in the Roman authors; and the expressions in St. Luke's gospel, that the Edicts of *Cæsar* should have authority throughout the *world*. *BARTOLUS*, however, thought himself so firm in his doctrine, that he says he would not hesitate to stigmatise the opposite opinion as an heresy. (*p*) Elevated with these notions, the fact certainly was, that the language of the Imperial Chanceries, in imitation of that of the antient Western Empire, affected to make the most eminent distinction between the *Empire* and other kingdoms.

(*m*) *Id. Ib. Duck De Author. Jur. Civ. Rom. 2. 1. 4.*

(*n*) *Conring. De Imp. Rom. Germ. S. 5.*

(*o*) *Imperatores autem Romanos fuisse Dominos, non modo Provinciarum Orbis Christiani, sed et totius mundi, multi Interpretes nostri acriter contendunt, Duck De Author Jur. Civ. Rom. 2. 1. 2.*

(*p*) *Id. Ib. Duck De Author. Jur. Civ. Rom. 2. 1. 2.*

Europe was proudly divided into the various jurisdictions of *Germany*, *Gaul*, and *Italy*; CHARLES the BALD, upon being elected Emperor, ordered himself to be called "*Emperor of all the Kings lying on this side the Sea*;" (q) and however powerful or independent many of them might have been, the Imperial Lawyers, forgetting that things were different from what they had been, asserted their Master's prerogatives over them all. (r)

These prerogatives were often asserted with an actual view to the enlargement of the bounds of the Empire, and of the Sovereignty of its head; and it even *now* forms the groundwork of those state reasons which are used by the Ministers of Germany, in order to support their various pretensions.—Thus under the old Empire, *Ulpian* having observed that all the isles circumjacent to *Italy* formed a part of that dominion; his authority is quoted in form against the Venetians to uphold the rights of the German Roman Emperor over their state. Nor is this opposed by them upon the ground, that the Empire, having

(q) Struv. Corp. Hist. Germ. Per. 4. S. 5. 5.

(r) Conring. ut sup.

fallen to pieces, the kingdom of Italy, when conquered by Charlemagne, was different from what it had been when it formed part of the Empire: but merely by contending that Ulpian spoke only of islands that were inhabited, which was not the case with theirs at that time. (s)

Among these prerogatives also, during the power of the old Western Emperor, the salutation of the foot from all subordinate Kings had been always confessed; and so strangely infatuated was the German Monarch with the idea of his succession, that, so late as the fourteenth century, he endeavoured to exert his claim against the high spirited EDWARD III. at Cologne, in 1338. The answer of EDWARD is somewhat remarkable. Those Kings who held their titles from God alone; in other words, whose Sovereignty was supreme, were generally *anointed* with the Sacred Oil, in imitation of the antient Jewish Princes. What difference this can really make in the supremacy of a nation's authority, it is not of consequence here to enquire. It should seem, however, that our ancestors allowed of the

(s) Rouffet Interets des Puiss. de l'Eur. i. 162, 164.

Emperor's claim to the salutation of the foot, from all Princes *who were not anointed*, for Edward's answer was, "*Quod Rex Angliæ, Rex erat inunctus, et habet vitam et membrum in potestate sua, et idcirco non debet sese submittere tantum, sicut Rex alius non inunctus.*" (t) The *Rex non inunctus*, may therefore possibly answer to the Kings *Homagers* of Lord Coke, as mentioned above. (u)

Similar to the resistance of Edward III. was that of the Duke of Gloucester in the reign of Henry V. The Emperor Sigismund designing to visit England, arrived at Dover; but when ready to take the land, says Speed, the Duke of Gloucester and other Lords with their drawn swords entered the water, and thus spake to the Emperor; that if his Imperial Majesty intended to enter as their King's friend, they would receive him with all willingness accordingly: *but if as Emperor*

(t) T. Walsing. ap. Camd. Ang. Norm. 146.

(u) Vide also Selden T. of Hon. ch. 7. who seems to think that the ceremony of *anointing* kings was an indispensable mark of their Independence.

to claim any authority in England, which was a free kingdom, they were then ready to resist and impeach his entrance. Which rough demand being most mildly answered by Sigismund, he had present access, and by them was attended towards London. (v)

Another prerogative of the antient Roman Emperors had been to create Kings at pleasure, a privilege indeed which was derived from the Republic herself, the most splendid exercise of whose power, was to dispose, almost wantonly, of the surrounding kingdoms. The new Emperors of the *West* therefore, contended also for the possession of this transcendent right, and it seems to have been allowed by all the Sovereigns of Europe without any contest. Accordingly, CHARLES the BALD is said to have created his brother in law *Boson*, King of *Burgundy*, in order that he might assert this prerogative of his ancestors, (w) and appear to rule over kings; and despising the plain manner and habits of the

(v) Speed. 646.

(w) Ut more priscorum Imperatorum Regibus videretur dominari. Struv. Corp. 4. 5. 7.

Franks, he even began to affect the more splendid vanities of the Grecian Ceremonial. (x) *Pfeffel* enumerates in form, this right of creating Kings among the privileges of the Saxon, and apparently of the Franco-nian Emperors; (y) and in addition to the erection of the Kingdoms of *Hungary*, *Poland*, and *Bohemia*, (z) and an extension of royalty in the family of Denmark, (a) we find that so late as the fourteenth century the title of *King* was bestowed upon *Humbert*, Dauphin of *Vienne*, by *LEWIS* of *BAVARIA*. (b)

It has been supposed by a late French writer, that this right continued, and was

(x) *Id. Ib.* (y) *Droit Pub. D'Allem.* 1. 192. 297.

(z) *Boleslaus*, Duke of *Poland*, received the title of king from *Otho III.* an. 1000. *Ruffend. Introd.* 4. 243. *Pfeffel* 1. 164. *Ladislaus*, Duke of *Bohemia*, was admitted to the same honour by *Fred. Barbarossa* 1157. (*Pfeffel* 1. 528.) and *Stephen*, King of *Hungary*, received his crown from *Hen. II.* the honour of conferring it being shared by the Pope in the beginning of the eleventh century, (*Heiss Hist. d'Allem.* 1. 65.)

(a) *Magnus*, Duke of *Sleswick*, was designed King of the *Obotrites*, by *Lotharius II.* in the twelfth century. *Rouffet Int. des Puiss. de l'Europe.* 1. 236.

(b) *Pfeffel*, 1. 540.

exercised

exercised even at the commencement of the present century, when in 1701 the Elector of Brandenburg converted *Ducal* Prussia into a *kingdom*, and assumed the royal title; LEOPOLD, according to Voltaire, exercising in that instance, the right which the Emperors had always assumed of creating *Kings*. (c) From the accounts of the matter, however, which I have been able to collect, it by no means appears that the regal aggrandizement of FREDERICK I. was owing to this prerogative of the Emperor, but merely that having *himself* taken upon him the title of King, the Emperor was prevailed upon to acknowledge him first, and the rest of the Princes of Europe were induced to follow his example. Such at least is the substance of the account given by the continuator of Puffendorf; (d) and Pfeffel also affirms that the Emperor acknowledged the Elector as *King*, and the latter having ordered himself to be proclaimed, placed the crown upon his head with his own hands, (e)

(c) Espr. des Nat. 3. 208.

(d) Introd. à l'Hist. Un. 5. 29.

(e) Dr. Pub. 2, 465. 470.

The Proclamation made no mention of the Emperor, or Empire, but was simply, that as it had pleased Providence that the *Dutchy* of Prussia should be erected into a *Kingdom*, and its Sovereign the most serene, and powerful Prince *Frederick*, had become its King, every one was given to understand the event by the said Proclamation. (f) *Lamberti* has detailed, somewhat at length, the account of this transaction; but though he observes that the Emperor's Ambassador was present at the ceremony; that he appeared well content that the new monarch should be called only King in Prussia; and sets forth the congratulatory letter of the Emperor to him, in which he denominates him merely "*Votre Dilection*," the title bestowed on *Electors*, and thanks him for having said that he would dedicate his new dignity to the service of the *Holy Empire*, and the Arch Ducal House of its Chief; yet it also appears, that the King styled himself in his circular letters, *Rex Borussie*; that his Ambassadors received and returned visits *as such*; and that the letter at the same time that it congratulates the Elector in the fullest terms on his accession of dignity,

(f) *Lamberti*, i. 380.

makes *no* mention of the imperial prerogative which conferred it. Nothing indeed in the whole of the account is to be discovered on the part of the Emperor, evincive of his power in this particular, except some expressions of the POPE of an ambiguous nature, easily explained, and by no means amounting to positive evidence, while unsupported by other matter. (g) *Rouffet* indeed in one part of his work makes use of the words "Ayant accordé le titre à Frederick," but he immediately adds, "Ce Prince se mit lui même la couronne sur la tête;" (b) and in another place observes that Leopold "*reconnut* cet Electeur comme Roi de Prusse, *apres qu'il en eut pris le titre.*" (i) It is remarkable that the author of the *Memoires de Brandebourg* himself, gives no insight into the trans-

(g) Upon the ground that the erection of this new monarchy, was prejudicial to the Roman Catholic Religion, the Pope complained. "De ce que l'Empereur y avoit donné les mains, et avoit même en quelque maniere, *erigé* cette nouvelle Royauté," &c. *Lamberti*, 1. 383. The *quelque maniere* applies merely to any vague *instrumentality* of the Emperor; it does not at all imply exclusively the actual, and formal exertion of his prerogative, while there is strong presumptive evidence against it.

(b) *Rouffet*. *Inter. des Puiss. de l'Europe*, 1. 812.

(i) *Id.* 1. 248.

action,

action, as to the particulars of the imperial official interposition; which, had there been any, he surely would have done. He states only the treaty by which the approbation of Leopold was obtained, and observes the circumstance that the Elector crowned himself with his own hands. Putter also, when he comes to this event, contents himself with saying, that in order to procure a royal crown for the House of Brandenburg, nothing farther was required, than to change the Duchy of Prussia, *which was already independent*, into a kingdom; and that in consequence of certain terms agreed upon, Leopold promised to *acknowledge* the Elector in future, King of Prussia. (*k*) *Martens* says positively, that it is a mistake to think that the Emperor conferred the Royal Dignity upon the King of Prussia. (*l*) *Heiss* is the only writer that I have seen, whose relation of the transaction is any way in support of Voltaire's positive assertion. He states, that the Emperor wishing to shew some marks of gratitude to the Elector for services received, "lui a donné la

(*k*) Putter. 2. 387, 388.

(*l*) *Precis du Dr. des Gens*. 1. 155.

qualité de Roi de Prusse ;" (m) a mode of expression, however, so little precise in itself, and so destitute of particular detail, that it can have little weight, while unsupported by any thing else, against that body of negative evidence which has been adduced.

I have been the more particular in this examination, because this statement of Voltaire, if not an error, would describe a very remarkable Constitution in Europe, and would attribute such supereminent prerogative to the Emperor, as no modern *supreme* King would willingly submit to. The Dutchy of Prussia was at that time an independent Sovereignty ; (n) and could we suppose the right really to have existed, the same power might have given royalty to any other Sovereign. It is therefore the more likely to have been as we have stated it, that the German Monarch merely acknowledged the new dignity in his own dominions ; and the rest of the European Courts confirmed it by degrees.

(m) Hist. de l'Emp. i. 352.

(n) Rouffet, r. 248.

With

With respect to the prerogative as exercised in earlier times, it is to be observed, that although it was confined according to *Pfessel*, to the vassals of the Emperor, and the learned *Selden* has therefore extended it to those only who were in "*Clientela Imperatoris*"; yet from the strange confusion, formerly mentioned, which was made between the vast personal dominions and numerous potent vassals of the first *Kings* of Germany, and the territories and prerogatives which were actually conferred upon them, as *Emperors of the Romans*; it was often, nay generally, exerted in favour of persons who were wholly unconnected with the Empire, and dependent properly upon the *Kingdom* of Germany. This was the case in almost all the above cited examples; but in the instance of *Hungary* a still farther usurpation was displayed; since it does not appear that King *Stephen* at the time when he was received among the Crowned Heads of Europe, was at all dependent either upon the Empire, or the Kingdom, and it could only have been allowed in consequence of the ignorance of the age, the mistaken superiority of the name of *Emperor* over that of *King*, and the

the reverence which was paid in those times to the successors of the Monarchs of Rome. Upon the whole, however, it was one of the most brilliant prerogatives of the Imperial Crown. Whether it still continue, or, if it does, what rank in the estimation of other Thrones, such a created King would bear, I leave it to those who are more learned to determine. But at any rate I think that Kings thus created in "*Clientela Imperatoris*," could only be considered in the same light with the Kings *Homagers* whom Lord Coke, as we observed, so carefully distinguishes from Kings that are supreme.

This distinction may also serve to explain one or two remarkable circumstances in the old Constitution of Europe, which are visible at this day, but which have been differently accounted for by a very learned authority. Professor *Putter*, while explaining the circumstance that Bohemia forms a dependant state of the Empire with a Royal Title; observes that according to the *present* Constitution of all Europe, no other king, considered in that quality, can be dependant, and it seems therefore,

fore almost a contradiction to say that there is a King of Bohemia, who, in that capacity, is a State of Germany. But, in antient times, when the public Law of Nations of the middle ages, did not consider it as an inconsistency for Kings to acknowledge their subordination to the Emperor, this might be thoroughly explained. (p)

Now with very great deference for his authority, although we have set forth many of the privileges claimed by the Emperors over other Kings, yet as the Kings, who were supremely independent, generally refused to allow them, (as in the case of Edward III above cited,) this phænomenon of Bohemia in the present Constitution of Europe, may, I think be better explained, by the foregoing distinction made between the antient Thrones, and the prerogative universally allowed to the Emperor of conferring an *inferiour* kind of Royalty upon his Vassals. This inferiour kind of Royalty might be conferred even by other potentates, who were themselves supreme. At least I find one instance of it in

(p) Putter. Constit. of Germ. 2. 394.

our own history, when, in the reign of Henry VI. Henry Beauchamp, the last Earl and first Duke of Warwick of his name, was crowned by that Monarch King of the Isles of Wight, Guernsey and Jersey. (g) Now it is of no consequence to say that the power of such a King was so circumscribed as scarcely to be known in Europe. The right was the same, and had the line of Beauchamp been continued, or from any acquisition of force, (for example in the civil wars which followed,) could he have been led into any connections with other Sovereigns on the Continent, a question might fairly be raised, whether the Royal title of this dependant State, composed of the Isles of *Wight, Guernsey and Jersey*, would not have been recognized by all other powers? In the same manner in more antient times,

(g) Leland's Itinerar. Selden Tit. of Hon. ch. 3. Heylin's help to Eng. Hist. voc. Warwick. It is rather remarkable that this event should not be in Dugdale's Baronage. It is true that Lord Coke observes that "as some do hold," the King had not power by the law of the land to create the Duke of Warwick King, because there could not be two Kings of the same country at a time. 4th Instit. 287. But, sua pace, his own distinction between Homagers and Supreme, might explain this, and it is to be remembered that the power to create the title, is the sole point of discussion.

many

many of the inferiour Kings of Spain were acknowledged to be such, though *Homagers* to the greater potentates of that country ; and many also of the Heptarchy in England, though dependant upon him who was called the Rex Primus ; a title enjoyed by many of them before Egbert. (r) Lastly, the King of *Man* seems, though the head of a very dependant State, to have been as *legally* ROYAL, as the King of *Bohemia*. For he subscribed himself by that title, received it from his superiours, and had an allowed right to a crown of gold.

Hence, therefore, Sovereigns that were dependant upon other States, being allowed to assume the Royal Title, as well as those dependant upon the *Empire* ; the circumstance

(r) Selden. ch. 3.

(s) Vide T. Walsing. ap. Camden Angl. Norm. 350. Edit. 1603. " Wilielmus Scroop, emit de Domino " Wilielmo de Monteacuto, &c. Insulam Euboniæ cum " corona. Nempe Dominus hujus Insulæ Rex vocatur, cui " etiam fas est corona aurea coronari." So also an MS. Chronicle, quoted by Selden, probably, however, copying this passage, affirms, " Est nempe jus illius Insulæ, & quis- " quis illius fit dominus, Rex vocetur, cui etiam fas est " corona aurea coronari." Selden says the MS. is in the library at Oxford, cui sciolus aliquis, nomen Guil. Risangar *temere* nuper prefixit an 1392.

that the subordinate State of Bohemia is a Kingdom, is neither *necessarily* owing to this antient European Law of Nations, concerning the prerogatives of the Emperor; nor should it seem, that it is even *now* impossible for any other dependant State, to bear the title of a Kingdom.

With respect to the erection of new Kingdoms in the present day, this privilege of the Emperors, which was shared as we have seen by the Popes, is at least grown obsolete, if it can be supposed at all to remain. Every independent Nation or Sovereign, has a right to assume what title it pleases, and it will depend upon the accidents of Convention with other States, of interest, or of necessity, whether, or with what modifications, they shall be allowed. (t)

Having thus attempted historically to trace the revival of the Western Empire, and the rights and prerogatives to which its Monarchs in consequence pretended; I shall now endeavour to investigate the real nature of the Im-

(t) Vide Martens, *Precis. du Droit des Gens.* 155.

perial Dignity as it formerly stood ; and more particularly to remark upon the close and not incurious affinity, which it has long been held with a particular kingdom, between which and itself there was no original, or *necessary* connection.

Many have supposed this to arise from a circumstance not founded in fact, namely, that the territories of the German Monarch were the *genuine* remains of the old Empire, and that the German and Imperial Crowns were therefore *necessarily* the same. This opinion continues in some measure to be a vulgar error to this day ; in former times it was often started, as the sound legal doctrine of the Law of Nations in Europe, and so late as the last century, *Hermannus Conringius*, a celebrated German Jurist, found it necessary to go at length into the question, which he has ably and elegantly done in the Treatise under his name extant upon the subject. (*u*) With respect to the mere Kingdom of Germany, however, it is well known that the greater

(*u*) Vide the *Discursus novus de Imperatore Romano Germanico*; and see also Duck. *De Usu et autoritate Jur. Civ. Rom. L. 2. C. 1.*

part of its provinces, north of the *Danube*, were never subjugated even by the most successful Conquerors who swayed the Roman Sceptre; and small indeed therefore could be the pretensions of its Monarchs to be called the legitimate representatives of those illustrious despots. The extended domination of CHARLEMAGNE, had indeed a far better title to this honour; but, as was formerly observed, it was the remarkable circumstance that he was *personally* though by *different* title, in possession of a great proportion of the old Western Empire, which gave rise to the idea that that mighty and identical power had really revived in his person; and that the assumption of the Imperial Dignity was nothing more than the *regular consequence* of such a dominion. Hence arose all those extravagant doctrines, and the hyperbolical positions of Bartolus formerly alluded to, which Conringius with indignation considers to be the tenets, "Vel indocti hominis, vel impudentis." (v)

The account of this matter need be very short. The Romans had acquired their do-

(v) De Imper. Rom. Germ. S. 6.

minions

minions in the same manner as other nations; and as they acquired them, so they might lose them. Province after province had been torn from them, by men as independent as themselves; and *Italy*, the chief of them all, had been ceded by the remaining *legitimate* empire in the *East*, to THEODORIC, King of the *Ostrogoths*. It was then again conquered *for the Eastern Empire* by BELLISARIUS and NARSES, and again lost to the *Lombards* and *Germans*. With respect to the other component parts of the Empire, they had long been torn asunder in the course of various revolutions, and were held, with a prescription of three hundred years in their favour, by Sovereigns wholly unconnected, and wholly independent of any Roman people that might be supposed to exist. In this state of things, it happened *adventitiously*, that CHARLEMAGNE, the greatest Monarch of the West, united, in his own person, many, or most of those Sovereignties which had formerly composed, but which were now independent of the old Empire. He held *Gaul* by hereditary succession; *Germany*, part of *Spain* and *Lombardy* by conquest; (*w*) and though

(*w*) Struv. Corp. Germ. Hist. Per. 4, S. 1. 12.

Lombardy included great part of Italy, yet it had long *passed out* of the Empire into the hands of an independent King; and from him, being conquered by another independent King, it could not be said either to revive as the old Empire, or to confer any rights upon its new master which it had not possessed before. It was after all these revolutions, and the acquisition of such various sceptres in his own person, that CHALEMAGNE gave liberty to the remnant of the Empire, *existing in the City of Rome, and a few Italian States*, by whose free election he acquired all which they could confer, namely, the Sovereignty over themselves, and the old Imperial title, which they alone, by a kind of *Postliminum*, as it seems to be allowed, had the right to evince. (*)

The new Emperor, however, thus elected, did not disdain to receive confirmations of his dignity from whatsoever quarter they could arise, and was not sorry, by an exchange of Embassies with the Constantinopolitan Court,

(*) Dein ex declaratione Romanorum qui quasi pro de-
relecto habiti, ex jure postliminii jus declarandi Impera-
torem sibi iterum vindicarunt. Struvius. Corp. 4. 1.

(where, it is to be recollected, the old real *Eastern* Roman Empire still existed,) to find his title acknowledged by those who alone could have had the semblance of a right to resist it. Hence therefore it has been supposed by a writer of authority, that he held the Empire by three titles; first, by actual possession; secondly, by free election; and thirdly, by compact with the Eastern Empire. (y)

It appears then that it was the people of *Rome* who properly conferred the Empire, and from whom that dominion continued ultimately to be derived; although, from changes in the constitution, as we shall hereafter see, the channel of power was also changed. In the successions immediately after CHARLEMAGNE, election by the Senate and the Pope, and coronation and consecration by the hands of the latter, seem to have been indispensable to the *legality* of the title. Nor can we here pass by a very remarkable addition to the style of the new Sovereign. By the constitution of the old Empire, it is known

(y) Struvius. ib. See also Duck, De Author. Jur. Civ. Rom. L. 2. C. 2. "Et cum Nicephero, *pactionem* inivit ut Oriens cum Constantinopoli Græcis Imperatoribus, occidentem, cum Româ Carolo et ejus posteris cederet.

that

that, however despotic the Roman Sovereigns were, they studiously avoided the name of *King*; and their power seems to have arisen not so much from the sole integral office of *Imperator*, as from an union, in their own person, of all the offices of the commonwealth. Hence they were *Imperators*, *Consuls*, and *Tribunes*, at the same time. Now it is worthy remark, that CHARLEMAGNE, having probably this custom in view, calls the first year of his reign over the Romans, *the first year of his Consulate*; (z) a circumstance which may serve to throw light upon the real nature of this new constitution.

Upon the whole, then, the new Monarch of the West held almost all his different possessions by distinct and different titles; nor could any of them, save Rome and its few dependancies, be considered as the *Empire*, merely because they were governed by the same person, unless an actual incorpora-

(z) Sigonius de Reg. Ital. L. 4. His style was, "Carolus, divino nutu coronatus, Romanum regens Imperium, Serenissimus Augustus, &c. anno regni nostri in Francia xxxiii, in Italia xxxviii, *Consulatus autem nostri primo.*"

tion of them all had taken place. (a) This, however, never was attempted, and CHARLEMAGNE, in the account of his other titles, was known to stile himself, (as in his Charter to the Bishopric of Osnaburg,) AUGUSTUS; Romanum gubernans Imperium; Dominus & Rex Francorum, et Langobardorum; Frisiorum Dominator, et Saxonum. (b)

CHARLEMAGNE associated his son LEWIS in the Empire, and dying in 814, LEWIS succeeded to all his dominions, and held them by the same titles as his father. It was the third generation that evinced the nature of the constitution. LOTHARIUS, the eldest of the sons of LEWIS, was also associated with him in the Empire, and succeeded on his death to the Kingdom of Italy. But neither did he carry along with him the whole of his father's territories, nor were the sceptres which were swayed by his brothers, (in Germany by LEWIS, and in France by CHARLES,) to be considered as *dependant* sceptres, subordinate to the *Imperial* diadem. On the con-

(a) Igitur aut inani cum titulo est affectus Carolus, aut si quid accepit, illa quæ in Italia, *extra* Langobardicum Regnum erant. Conring. De Imp. Rom. Germ. S. 26,

(b) Id. S. 31.

trary, when he claimed to be superiour to his brothers, in right of primogeniture, *and of the Empire*, they contended “quod LOTHARIUS fratres erant, et sacramento regnum inter illos divisum fuerat, et illi genere, nec potestate inferiores erant.” (c) LOTHARIUS, not content with this reasoning, attacked the *Kings of Germany and France*, and fought the famous battle of *Fontenay* in 841, where being entirely defeated, it was settled by the treaty of *Verdun* 843, that the *Kingdoms of Germany and France* should thence forward be for ever disjoined; a settlement which, in general, is regarded as the true epoch of the entire separation of those realms. (d)

LOTHARIUS followed the example of his father and grandfather, in associating his son LEWIS in the Empire, which, *still confined to the limits of a part of the Italian States*, was again, upon his death, dissevered from the rest of the possessions that had been held along with it. LEWIS II. succeeded to a powerless Throne; and a new kingdom (of *Lorraine*) was created for his younger brother, LOTHARIUS.

(c) Hincmar. Epist. ad Ludov. Balb. ap. Conring. 33.

(d) Pfeffel i. 59. Putter. i. 7. Conring. 34. Sigon De Reg. Ital. L. 5.

RIUS.

RIUS. Upon the death of LEWIS II. without heirs male, CHARLES the BALD, King of France, succeeded *by election of the States of Italy*, (e) after a contest with his nephew, CARLOMAN, son to the King of Germany. He dying, another contest arose between his son, LEWIS the STAMMERER, of France, and the same CARLOMAN, who by this time was King of Italy, but *not Emperor*. Some pretend, that the latter was elected into the Imperial Throne; but others again assert, that LEWIS was consecrated by the Pope, JOHN VIII. at TROYES; a doubtful and uncertain election! Be this as it may, the *Empire* was next conferred upon CHARLES the FAT, King of *Swabia*, youngest son of LEWIS I. King of *Germany*; and it was the fortune of this Prince to reunite in his own person almost the whole of CHARLEMAGNE's dominions by succession. After his death, many difficulties arising from the disputed legitimacy of CHARLES the SIMPLE, the last branch of the *Carlovingians* that remained in France, ARNOLPH, a bastard of Carloman, was

(e) Pfeffel. i. 68. Struvius, upon the authority of the Annals of Fulda, asserts that it was by bribery of the Senate, which at least shews their power of electing. *Omnem Senatum populi Rom. corrupit.*

elected

elected *King of Germany*; but the *Kingdom of Italy* (always hitherto distinct from the Empire) was disputed by BERENGER, Duke of *Milan*, and VIDO, or GUY, Duke of *Spoleto*. It was possessed by both for some time; (f) but at length VIDO overcame his rival, and was afterwards elected Emperor of the Romans, crowned by the Pope, and associating his son LAMBERT in his dignity, the latter was also crowned. BERENGER, flying for assistance to ARNOLPH, the latter took that opportunity to interfere in the affairs of Italy, and marching to Rome, (GUY being by this time dead,) was himself crowned Emperor, (g) and enjoyed the title till his death. Upon that event, the *Kingdom of Germany* went to his son, LEWIS III. who died without issue in 911, and with him ended the whole of the Carlovingian race in Germany; but the Empire seems next to have passed to LEWIS of PROVENCE, King of *Burgundy*, who obtained it by an election of the Romans; and after him it fell to BERENGER, King of *Italy*, the *Kingdom of Germany* still going on in another line, as will immediately be shewn.

(f) Baron. Annal. 892. Sigonius. L. 6.

(g) Struv. Corp. &c. 4. 8.

The death of LEWIS III. thus left the throne of Germany vacant, the nation still resolving to pass by CHARLES the SIMPLE of France, either on account of his illegitimacy, or his imbecility; and, in this emergency, they proceeded to a fair and free election of a Sovereign worthy to reign over them. The choice fell on CONRAD of FRANCONIA, who dying without issue, they elected HENRY the FOWLER, and after him, his son, OTHO I. or the Great, who once more brought back the Imperial dignity into the family of Germany, and fixed it there for ever.

That dignity had, in the mean time, been restored to LAMBERT, the *Associate* of his father, GUY, (b) and afterwards was conferred, as above-mentioned, upon LEWIS of PROVENCE. It then continued at the mercy of such of the tyrants of Italy as could make themselves masters of the Bishop and Citizens of Rome, from whose choice and consecration it was still supposed exclusively to arise; and so various was the success of these pretenders, and so completely had the *Kings of Germany* seemed to have lost sight of this

(b) Sigon. L. 6.

dignity, (supposed to be so closely united to them,) (i) that Gibbon has imagined the real Western Empire to have been actually *vacant*, during a period of seventy-four years. (k) This opinion was founded, no doubt, upon the same grounds which have drawn an assertion from *Conringius* that the remains of the Roman Empire were at this time totally disjoined from the kingdom of Germany, and for the most part without an Emperor at their head.

All this being understood, I know not from what documents of history many authors have chosen to consider all the Kings of Germany from the time of ARNOLPH, as *Emperors*. We have shewn that Germany, taken by itself, was nothing more than a Kingdom, and that its Monarchs could only be reckoned among the Emperors when they were *elected* to the Imperial Dignity by the Romans, and actually crowned at Rome by the Pope: yet the whole course of Heiss's History describes the German Sovereigns as

(i) Conringius calls Germany, at this time, "*Distinctam et sui Juris Remp.* S. 34.

(k) Dec. & Fall. Ch. 49.

Emperors; under which, therefore, he classes LEWIS III. son to ARNOLPH, CONRAD of FRANCONIA, (who had no connection with Italy at all,) and HENRY the FOWLER, father of OTHO, who was only *invited* by the Pope to take upon him the Imperial Power, but never passed through the forms of election. *Heiss*, however, is not consistent even with himself; for though he relates, that upon the death of CONRAD, the Nobles elected HENRY to the *Imperial* Crown; yet he adds immediately afterwards, that the Pope offered to declare him *Emperor of the Romans*. (l) It is evident, therefore, I think, that he confounds, and very improperly, the *Regal* title of *Germany* with the *Imperial* one of *Rome*.—*Puffendorf* also reckons LEWIS III. CONRAD, and HENRY, among the *Emperors*, only observing that the affairs of Germany were in so bad a state, that they could not attend to Italy. (m) But, according to us, they had no right to concern themselves at all with Italy; and when *Puffendorf* himself comes to OTHO, he speaks of the *Empires* of *Germany* and of

(l) *Heiss*. Hist. de l'Emp. L. 2. C. 2.

(m) *Introduct.* à l'Hist. Un. 3. 2.

Rome as distinct, although the former, taken by itself, was never, as we have shewn, properly to be called an *Empire*. Dr. Blair, in his Chronological Tables, enumerates Lewis, Conrad, and Henry, in the list of the same Monarchs, although with more consistency, and dropping the title of *Emperors* of the *West*, he here actually calls them Emperors of Germany. The author of the Letters on Modern Europe pursues the same account; and lastly, Robertson, who was led by his subject to the particular investigation of this matter, chuses also to consider Germany as the Empire before OTHO, and to rank HENRY among the *Emperors*. The first notice indeed which he takes of the Roman Imperial Title, commences with the transaction of OTHO; and from the very short account of this remarkable Throne which he gives, it should seem almost, that that Monarch had been the first in the world, (and that, without shewing his right,) to receive it. "Elated with his (*Otho's*) success," says this celebrated historian, "he *assumed* the title of CÆSAR AUGUSTUS. A Prince, born in the heart of Germany, *pretended* to be the successor of the Emperors of antient Rome, and claimed

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ed a right to the same power and prerogatives." (n)

On the other hand, Gibbon confesses that it is the power of custom alone which forces him to rank Conrad and Henry in the list of Emperors; a title, he observes, never assumed by those *Kings* of Germany: (o) and *Baronius*, *Sigonius*, (p) *Struvius*, and *Pfeffel*, (q) authors of high authority in antiquities which came almost professionally before them, assert positively that LEWIS of Provence succeeded ARNOLPH in the Empire, and after him, BERENGER, and various others of the *Italian* Princes, till the election of OTHO. They therefore reject Lewis III. Conrad, and Henry; and Struvius, in particular, makes a regular question in every one of the sections concerning them, whether they were Emperors of Rome, or only Kings of Germany; and he decides in favour of the last. (r)

From

(n) Robertson. Ch. v. 1. 209. Surely this must be deemed a very unsatisfactory account of a matter so important.

(o) Decl. and Fall. Ch. 49.

(p) Ut sup.

(q) Dr. Pub. D'Allem. 1. 98.

(r) Imperator vero dici nequit, (*Ludovicus* III.) dum nendum Germanis in hanc dignitatem jura essent, nec Ita-

From all this it will appear, that the designation of EMPEROR OF THE WEST, from the time of its revival under CHARLEMAGNE, was in reality a floating title, by no means affixed to any particular Kingdom, but liable to be given to the Chiefs of any State that could acquire it by election; of course, that neither *France*, nor *Germany*, *Burgundy*, nor *Lombardy*, had any *exclusive* claim to it, by virtue of any supposed representation of an Empire to which they had long ceased to belong, and to which, if they appeared to be reunited, it was simply by the adventitious circumstance that they were governed by the same Sovereign; in the same manner as our own Kingdom, and the Electorate of Hanover, are governed by one Monarch, without coalescing into one and the same State. Per-

liam possideret quam isto tempore tenebat *Ludovicus Bosonis filius*, et hoc ejecto *Berengarius*, nec a Papa esset coronatus. Corp. Hist. Germ. 4. 9. Again, after saying that the Germans elected Conrad King of Germany, he asserts, "Imperator autem dici, nulla ratione poterit, dum
" *nec Germani adhuc jus haberent in Imperium Romanum*
" nec ipse a Romanis vel evocatus, vel in Imperio fuerit
" coronatus." Id. S. 10. So also, after examining the title of *Henry* to the Empire, he concludes, "Fuit igitur
HENRICUS, Rex Germaniæ, non vero Imperator." Id.
S. 11.

haps

haps it may even be fairly supposed that this dignity was actually not hereditary in the *Carlovingian* family; for if it had been so, the descent would no doubt have been governed by some certain rule: but from the circumstance, formerly mentioned, that CHARLEMAGNE had revived the old Roman Constitution, in styling himself *Consul of Rome*, it should seem that he had not these ideas of it himself; and we may observe that, invariably, in the four instances recorded, where the sons succeeded immediately to their fathers, they had been previously *associated* in the Empire. In all other cases, the fact appears to have been, that whoever got first to Rome, and acquired the voices of the Senate and the Pope, was honoured with the contested title; and a confusion was thus made between the uncles, cousins, and nephews of the last possessor; between his kinsmen claiming through the male, and through the female line. It is probable, therefore, that the same right which could *alter* the succession by election, could have set aside the whole family; nor is it of any consequence that *all* the Emperors before OTHO, were of the family of CHARLEMAGNE,

the power of that Monarch having been so vast, and his posterity so numerous, that not a Throne in Europe but was descended, either collaterally or lineally, from his blood.

This then being understood, I shall now proceed to point out how and when it was that the Germanic *Kingdom* and this celebrated Empire, illustrious even in its remains, came to be really united; that is, when they came to form one incorporate body, so as to exclude all chance that the Imperial Dignity should again be bandied about from Kingdom to Kingdom, as had been the case from the time of *LOTHARIUS I.* to *OTHO*.

It was done by actual Convention between the *Romans* and their Bishop, Pope *ADRIAN III.* and the last mentioned Monarch, who like *CHARLEMAGNE* crossed the Alps to deliver the church, and like him reaped the Kingdom of Italy and the Imperial Crown for his reward. The cruelty and oppression of the various tyrants of Italy, had made such of its States, as avowedly represented the old Western Empire, eager to search for deliverers among
the

the most powerful of the neighbouring Princes: and as none during their time could be compared to OTHO in real strength or firmness of character, the citizens of *Rome* were willing to confer upon him their illustrious Sovereignty. Stimulated by this, and the hopes of the Kingdom of Italy, enjoyed by the tyrant *Berenger*, the *King of Germany* twice passed the Alps, and having finally overthrown the power of his opponent, he was not only elected *King of Italy*, and *Emperor of the Romans*, but it was decreed that those dignities should for ever be annexed to the *Sovereignty of Germany*, to be enjoyed by whomever the Nobles of that Kingdom, who had the power of election, should chuse to appoint. A remarkable Constitution! which, however, has continued to this day, and is the true foundation of the strict incorporation of the German and Roman powers. Accordingly, from this time it was, that the Sovereign of *Germany*, omitting the enumeration of his distinct and various titles, subscribed himself simply EMPEROR OF THE ROMANS; an alteration which gave birth to the belief, that the dominions governed by the

Roman *Emperor*, must be the Roman *Empire* itself. (s)

But although the two Sovereignities are now so closely united, that the Chief of the one, must *necessarily* be the Chief of the other at the same time; yet even this union it should seem, is not so strict, but that they may be still considered as distinct Sovereignities. That is, they are not so blended together as to form but one body, as the Kingdoms of England and Scotland; which, for example, are, as it were, annihilated, and a new Kingdom of *Great-Britain* substituted in their places. The *Empire* of Rome, and the

(s) Conringius, 39. Putter B.2. ch. 3. In fixing this important transaction, I have chosen to follow Pfeffel, although other Jurists (as Putter) have asserted, that OTHO I. only annexed the empire to his *family*, not to the *Crown* of *Germany*, and that it was under his grandson OTHO III. that this *new* constitution was settled. Putter's only account, however, is, that it was so to all appearance. (B. 2. ch. 3.) while Pfeffel produces on his side, the testimony of *Luitprand*, Bishop of Cremona, (a well known historian, and himself the Emperor's Representative at the Council of Rome where the business was settled;) and the confirmation of *Yves de Chartres*, and *Waltram de Naumbourg*, two eminent Canonists, who rely upon it in the eleventh century, as true. Droit Pub. d'Allem, 1. 142.

Kingdom

Kingdom of Germany are still in existence as *such*; long after OTHO I. three different Crowns were worn by the German Monarch, namely, the *Imperial*, the *German*, and the *Lombardic*; and to this day, his titles are carefully kept distinct, he being stiled not *Emperar of Germany* as is vulgarly supposed, but elected *Roman Emperor*, and *King of Germany*. (t) Thus, according to *Conringius*, “aliud fit esse Regem Germaniæ, aliud electum Cæsarem Romani Imperii.” (u) And with this we shall close this complicated subject.

The claims to Sovereign Dominion as Emperor, the detail of which we have been giving so much at length, have however, now gradually worn away before the lights of

(t) Dillon's account of the Rom. Emp. p. 8. Putter. B. 4. Ch. 4. The title of elected Emperor was assumed in consequence of a Convention between Maximilian I. and Pope Julius II. The former wishing to be crowned at Rome, 1508, the Pope, who desired not to see him in Italy, declared of his own accord that the ceremony should in future be dispensed with, provided that Maximilian and his successors should style themselves *elected* Roman Emperors, which with the reassumed title of King of Germany, has been the custom ever since. Ib.

(u) Conring. S. 40.

modern

modern ages; and nothing is now left him but the precedence before all European Monarchs, except the POPE. (*w*)

Even this also has been constantly contested by the Turkish Emperor, who, probably founding his claim upon his succession to the antient Greek Empire, (*x*) insists upon an entire equality with the German Sovereign; and this was at last allowed and put out of doubt, by the Treaty of *Passarowitz*, 1718, and that of *Belgrade* 1739. (*y*)

(*w*) Mackenzie 1. Temple's Mem. 1672. 1679. So late however, as the Congress of Nimeguen, he pretended to something more than the first place in the same rank. At that Congress the Ambassadors of all the other belligerent powers, yielded, according to the custom, to the *Mediators*. The Emperor's, however, affected *Equality*. They also treated the Ambassadors of *Electors*, with the same honour as those of crowned heads, with the view, says Temple, as his own superiority above *them* was confessed, to infer a like superiority over the others—"for the Emperor pretended to a difference of *rank*, as well as of *place* from all other Monarchs, the last of which only was allowed." *Ib.*

(*x*) Et Sultani Turcici vane asserant se esse Successores Constantini Magni in Imperio Romano, Duck. du Author, Jur. Civ. Rom. L. 2, C. 2. 4.

(*y*) Martens. *Precis du Droit des Gens*. 1. 160, 161.

Possibly

Possibly it may at first appear irrelevant, in a treatise which regards a whole *Class* of Nations, to have been so long upon points that relate solely to a particular Kingdom. When however it is considered, that the precedence of that Kingdom has become part of the Law of Europe, in virtue of a very remarkable succession to a throne with which originally it had no connection; that this throne itself had, in former times, sent forth other pretensions which concerned almost the whole world, and which depended upon a variety of minute and curious circumstances, the investigation of which leads deep into the antiquities of a particular constitution; it will probably be deemed even more than pertinent to have gone as we have done into the enquiry. For it is one of the profest objects of this work, to endeavour to *account* for things which have been wholly passed by, or but slightly mentioned by those other Treatises on the Law of Nations which are now in use. (z)

The

(z) *Mackenzie*, though he wrote expressly on the precedence of Europe, contents himself with saying in general terms, that the Emperors of Germany succeeded to the Roman Emperors, without shewing how, or taking any notice

The next doctrine concerning precedence, as *admitted* by the Nations of Europe, which I shall mention, is that by which all countries under *Republican* forms of Government, were held to be inferiour in rank to Monarchies. Of all other received maxims, perhaps, this was one of the most unjust, and the most

notice of the chasm of 300 years between the two. Vattel (probably despising the subject) when he comes to speak of the precedence of the Emperor, is far from being ample enough or even satisfactory in what he does advance. He says merely, (*Dr. des Gens. 2, 3. 40.*) that the division in the house of Charlemagne, having given the Empire to the eldest son, the younger who had France, yielded to him, in place, and the more easily *qu'il restoit encore dans ce tems la, une idée regente de la Majesté du veritable Empire Romain*: that the successors of the King of France followed the custom which they found established, and that they were imitated by other Kings. He thus passes by the whole rise and constitution of the Imperial Dignity: what was really to be understood of the "*idée regente du veritable Empire*" (a mode of expression which would lead one to suppose that it was soon afterwards lost;) the circumstance that the King of Germany was younger brother to the Emperor after the division, as well as the King of France, and, above all, what it was most material to observe, the Convention between Otho I. and the Romans. He afterwards observes that the other crowned heads are not agreed as to rank, and this is all which he brings forward concerning a subject of serious importance during those times, the law and custom of which it is our object, as far as we are able, to detail.

destitute

destitute of reasonable support; it being scarcely possible to conceive, when it is the *Independence* and Sovereign Dignity of a Nation which are to be represented, what alteration can be produced in them by a difference of Constitution. The Sovereignty of every State must be somewhere lodged, and *quoad* that Sovereignty, (taken in the abstract *as such*, without reference to its component parts,) it matters little, with respect to foreign Nations, whether it is possessed by one man, or by many, by hereditary descent, or by election. And as all Nations, that are purely, and equally Independent and Sovereign, must be equal in rights among one another, and the Governments of Nations, whether Monarchical, or Republican, are their only Representatives; the common sense upon the subject is, plainly, that the Governments of Nations are also equal, in respect to one another. There can therefore, fairly, be no difference in point of rank between States, drawn from the nature of their various constitutions. It has been well said by *Grotius*, that so long as a people are not absolutely annihilated or dissipated, their exterior duties must remain the same, in spite of every change in their Constitution

tution that can possibly happen ; and thus that the debts due by one free nation to another, are not the less due, because a *King* is imposed upon them. (a) But if this is the case with respect to duties, it must also be so with respect to rights ; and if equality of place, be the right annexed to equality of Independence, an Independent *Commonwealth* should be equally high in the scale of pre-eminence, with an independent *Monarchy*. Our ancestors however judged otherwise, and in spite of the plain reason of the case, the fact is certain, that *Monarchs* claimed, and were allowed the precedency before *Commonwealths* in every part of Europe. (b)

That this was the known custom, is sufficient to induce us to record it, and the reason for it may probably be ascribed to two causes.

I. in all cases where precedency could come into question, the contest could only be conducted by the executive Governments of the people concerned, or their representatives ;

(a) D. J. B. et P. 2. 9. 8. 2, 3.

(b) Vattel, 2, 3. 38. Mackenz. 26. Martens Prec. du Dr. des Gens. 1. 160.

and men, particularly in times when the true principles of Government were ill understood, did not, in all probability, look farther than the *persons* of their antagonists. In this case, there could be no *personal* Equality between a Monarch, possessing, perhaps, an undivided Sovereignty, and deriving his authority to contend, solely from himself; and a council of men, whose authority was probably not permanent, or dependant upon others, who again, perhaps, might look to powers still farther removed, for the dignity of their stations. In earlier times also in Europe, *Commonwealths* were absolutely new, in comparison with the antient dignity of King; and the directors of *Republics*, were possibly elevated to their power in the very memory of the Sovereigns, to an equality with whom they pretended. It was not therefore surprising, though the matter was certainly not well understood, that the opinions of men made a distinction between them. If the contest was between *Ambassadors*, this reasoning would be brought into a shape almost palpable; for *Ambassadors* being supposed to represent the very *person* of their employers,

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employers, (c) the Ambassador of an *Emperor*, might not unfairly, upon this idea, contend for precedency before an Ambassador, appointed perhaps by a Council or Committee, composed of private individuals. Upon the same principle it probably also was, that an *Elective* King, was considered for a long time, as inferior in dignity to one, who derived his rank from a long line of ancestry, and a throne of old time established in his family. (d)

II. The reason for the pre-eminency of Monarchies in former times, was drawn, in all probability, from the doctrine, not then exploded, of the divine right of Kings; which, *wherever it was allowed*; would carry it, beyond question, from those who were supposed to hold their power by a less noble tenure. It was this also, without doubt, that

(c) Those who are acquainted with the nature of the divisions of the diplomatic character into Ambassador, Envoys, Residents, &c. or, as it is arranged, into Ministers of the first and second order, will easily understand this.

(d) Mackenz. Molloy de Juv. Mar. 99. Winwood's Memorials, 2. 70.

produced

produced the difference formerly touched upon, between Kings that were anointed with the sacred oil, and those who exercised the functions of a Sovereign, but who were not supposed to possess them in their full and undivided supremacy:

This precedency of *Monarchs* before *Commonwealths*, has been so universally received in modern Europe, that two only of the latter have ever been allowed to rank with the former. These are the illustrious Republics of *Venice* and *Holland*, the first of which, however, originally enjoyed this privilege, more in virtue of possessing the Kingdom of *Cyprus*, than on account of its power or reputation. (e) Even the celebrated Republic of *Genoa*, whose riches and fame were such, as to acquire for her the appellation of "SUPERBA," could never attain to this contested honour. In the war of *Candia*, so adverse to *Venice*, it offered that rival Commonwealth considerable succours of men and money, for the honour of being treated by her on terms of *Equality*, but the offer was

(e) Wicquef. De l'Ambass. 1. 350. Mem. touch. les Ambass. 345. 347.

refused with contempt. (*f*) It is said also to have been ready to advance millions, for the privilege of receiving audience by their Ambassadors at Rome, in the *Sala Regia* instead of the "*Sala Ducalis*," to which the watchful rivalry of Venice, proceeding upon the known customs of Europe, had always obliged the Pope to confine it. (*g*) At the same time, it should seem that even this equality in *Venice* with crowned heads, was in some measure qualified, since the *Venetian* Ambassadors, when order, or procession was concerned, took rank only next to the Ambassadors of kings. (*h*)

Venice was sole in the enjoyment of these honours among Republics, till the rise of the

(*f*) Amelot de la Houss. Hist du Gouv. de Ven. i. 114.

(*g*) Id. Ib. & Wicquef. i. 230

(*h*) Mem. touch. les Ambass. 345. Vattel. 2, 3. 38. At the Court of James I. of England, on the occasion of the Palatine's wedding, a contest concerning an *invitation to supper*, arising between the Ambassadors of the Arch Duke and the Republic of Venice, the former observed that his master would never allow "so much as a question or "thought of a competition between him, a *Monarch* " *Souveraigne*, and a meane Republique, governed by a set "of Burghers," Finet. Puntillos and Contests of Forren Ambass. in England, p. 3.

Belgian

Belgian Commonwealth in the last century, which, having attained to independence and considerable power, claimed, and acquired the same rank. The claim came on in the shape, not of pretensions to rank immediately with crowned heads, but simply to be treated as the equal of *Venice*, which was peremptorily insisted upon in the instructions from the Prince of Orange to the Dutch Ambassadors at Munster, 1645, and from that time has been universally allowed. (i)

With respect to other Republics, various have been the competitions between them, which, as they proceeded upon the same reasons as those we have already detailed concerning precedency in general, we shall not farther touch upon; contenting ourselves with referring those who may be curious upon a subject, which is merely curious, to such authors as have made it more immediately their object to record them. We cannot however conclude this part of our discussion, without agreeing in the remarks of *Vattel* upon it, that no real difference ought to take place as to rank, between *Commonwealths*

(i) Mem. touch. les Ambass. 524.

and Monarchies ; and that the distinction which has actually been allowed, can only be deemed an *usurpation* of the latter, founded on the right of the strongest. (*k*) In antient times, when the features of Europe were reversed, and *Commonwealths* were the greatest powers known, the *Monarchies* then in existence, were considered as inferior in dignity, and few Roman noblemen, but would have spurned at the idea of entering into the balance with the first Kings of the world. Certain at least it is that this part of the jurisprudence of the Western Nations, even in modern times, depended so much upon *power*, that when the faction of *Cromwell*, had born down all that was good and great in the realm of England, and had imposed upon it a nominal state of Republicanism, the power and weight of the country obliged all other states to allow, in matters of punctilio, the full rank and precedence which she had before enjoyed. (*l*)

These are the great points which seem to have been determined in the ceremo-

(*k*) Dr. des Gens. 2, 3. 38.

(*l*) Thurloe's State Pap. 3. 315. 4. 740. Vattel, 2, 3. 39.

nial of Europe, concerning the rank and claims of its various nations. There are several others, more minute, upon which, though of little consequence in themselves, I shall shortly touch, for the sake of taking in every part of the subject.

By these it seems to have been settled, that *Feudatories* should yield to States that were Paramount, (*m*) and that Sovereigns of inferior dignity, (as *Dukes*) should yield to superiour Sovereigns, who were *Kings*; both of which seem to be in conformity with common sense: that a power though inferior, (as a *Duke* or *Elect*or) when present in proper person, should take rank of a power which was superiour, but present only by his representative or Ambassador; a point formerly much contested, and which so late as the beginning of the present century, was supposed to deserve the particular investigation of Van Bynkershoek, who decided in its favour: (*n*) That the Electors of the Empire, *within its precincts*, are equal to crowned heads, (*o*) and

(*m*) Mackenz, p. 11.

(*n*) Quæst. Jur. Pub. L. 2. C. 9.

(*o*) Mem. touch. les Amb. 519.

are every where honoured by them with the appellation of brother. Lastly, that the King of France, before the Reformation, took rank of all other European Sovereigns, next to the Emperor.

With respect to this last, it may be supposed that it was a point of so much nicety, as not to pass off without much contest; but, as far as I have been able to observe, it was, upon the whole, allowed, upon the authority of the Papal regulations; and in all ecclesiastical ceremonies, and at general councils, the place of the *French Ambassador* was almost constantly, till the sixteenth century, allowed to be next in rank to that of the Emperor. (p) At that period, however, upon the resignation of the Emperor CHARLES V. a fierce contest, almost immediately ensued for the precedency between France and Spain, which was not decided till the last century, when it seems to have ended in favour of France.

The Spaniards, who till then had never disputed the point, were unwilling to part

(p) Wicquef. L. I. S. 24.

with

with the rank which CHARLES, as Emperor, had acquired; and his son Philip, forgetting that the Sovereign of Spain was no longer on the Imperial Throne, insisted with much heat upon keeping his pre-eminence. This, however, was vigorously contested by France, at *Venice*, where the first contest began in 1558. The Spanish Ambassador, *Vargas*, pleaded, that the rules of precedence must change with the course of events; and that his master, *being the greatest Monarch of Europe*, his rank as such, ought to be adjudged. But *Noailles*, Bishop of *Acqs*, the French Ambassador, opposed him with warmth, and the Senate decreed that, without entering upon the examination of the grandeur of the two Kings, they found upon their registers that *France* had always been preferred in place to *Spain*, and they therefore felt obliged still to decide in her favour. (q) Four years afterwards, the cause was renewed with augmented zeal and heat, at the council of *Trent*; where the chief business of PHILIP, bigot as he was, seems to have been to accomplish this empty superiority. On the other hand, the

(q) De Callieres. Man. de Negoc. 1. 326, 327.

French Court gave peremptory instructions to *St. Gelais*, their Ambassador, not to yield a tittle of the antient prerogative of the Nation; and if the smallest alteration in the ceremonial was attempted to be made, he had positive orders, not only to quit, but to protest against the legality of the Council, and to bring away with him all the French prelates. Philip, remaining firm, would not allow his Ambassador the *Count de la Lune* to proceed to *Trent*, till his place should be settled, and the Pope in vain proposed that he should be absent altogether from those ceremonies where competition could arise. In the course of the affair, disputes rose so high, that the French declared they would even withdraw themselves from their obedience to the see of Rome, if their place was taken from them; and at length, after many indecencies, which even the sanctity of divine service was not able to repress, it was agreed, that the *French* at the Council, should keep their place, but that the *Spaniard* should change his, and be placed, not third in order from the Legate, (who was at the head of the whole,) but on a seat of eminence, opposite to him. (r)

(r) Wicquef. i. 24. De Callieres ut Sup.

In

In this contest, it was difficult to say, who was the first. In another, which arose immediately after at the chapel at Rome, the Spaniard was forced to yield. (s) At the congress at *Vervins*, 1598, the French again kept their ground; (t) but at *London*, 1617, King James, whose inclinations were more favourable to Spain, seems to have preferred the latter. The occasion of the dispute was trifling, and would not be mentioned, were it not for the strange pretension which, it is asserted, was on that occasion set up by the French. A mask being prepared on Twelfth Night, the *Spanish* Ambassador was invited, to the exclusion of the *French*, who was so impatient of the affront, that he immediately demanded an audience, asserted that his master had a right of priority before any other King, but particularly before that of Spain; nay, even that if the *Spanish* Ambassador had ever heretofore been present at any such entertainment or solemnity at Court, *it was by the French Ambassador's permission*, when either that he would not be there, or that he was sent to by his Majesty to intreat his absence. This re-

(s) Wicquef. Ib.

(t) Mem. de Belliev. & Sillery. p. 28.

presentation being of no effect, he threatened to make protestation of the wrong done to his master, and was actually recalled upon it by his Court. (v) Of such importance, in the minds of our ancestors, was an invitation to a mask ! The contest between the nations was continued at *Munster*, where the Ambassadors never would see each other, and where a Congress, to put an end to thirty years war, had nearly been broken up, because it could not be settled which of the two Crowns should be named first in the public acts. But the dispute most celebrated, and most serious in its consequences, was at London in 1661 ; in which, though the Spaniard at first had the advantage, the pride of LEWIS XIV. demanded, and obtained a decisive retribution.

The Count of *Soissons*, who, previous to this year, had been the Ambassador of France at the English Court, had agreed to wave all contest with *Spain*, by a compromise, that neither should appear in places where contest would arise. When, however, the Count *D'Estrades* arrived, he had strict orders to assert the French claim ; and, for this pur-

(v) Finet Puntillos of For. Amb. in Eng. 48.

pose,

pose, foreseeing that things might come to extremity, had taken over with him a number of Officers belonging to his own and his son's regiments, together with some of the garrison of Gravelines. He also assembled the friends of four Colonels of the Irish Brigade, who happened to be at London; and all these precautions made the Court justly fearful that an affray would arise, which might occasion disorders in the city. (u) At this time it was the custom, upon the public entry of an Ambassador at any Court, for all other Ambassadors at the same Court to meet him in procession; a kind of solemnity in which it was necessary that Place and Order should be preserved. Upon the entry, therefore, of the *Venetian* Ambassadors, the King desired the two rivals not to appear at the ceremony, which saved the contest for that time. But each party being resolute, it could not long be prevented. The Spaniard offered *Equality*, observing, in the pomp of the Spanish language, that the two nations ought to divide equally the *Earth*, the *Water*, and the *Sun*! (w) but the orders of *D'Estrades* being peremptory, he refused it, and insisted on maintaining his

(u) *Negoc. D'Estrades* 18. Juill. 1661.

(w) *Id. Ib.*

place when opportunity should offer. The Swedish Ambassador afterwards making his entry at the Tower, the Court, on this occasion, resolved to stand neuter, and allowed the Ambassadors to attend the procession in the usual manner, though they surrounded Tower-Hill with guards, to keep the English from taking any part, in case the dispute should prove serious. The *Spanish* Ambassador came attended by a train of near fifty persons armed; the *Frenchman* with one hundred and fifty; whereof forty were horse, well appointed, with pistols and carbines. The French coach attempting to pass next to the King's, the Spaniards, by shouts, frightened the horses, and took their place. The French in revenge, "poured in a volley of shot upon them," and immediately began the action; during which a *Spaniard*, provided with an instrument for the purpose, ham-stringed the French coach-horses, and the rest making head, the Spanish coach obtained, and kept the place in contest. In this action eight persons were killed, and forty wounded (x) and

(x) Vide "The Manner of the Encounter between the French and Spanish Ambassadors," &c. drawn up for the English Court, by Mr. Evelyn. Biog. Brit. Art. Evelyn.

Lewis

Lewis XIV. was not unjustly offended at so great an injury to his honour. The event, however, was ultimately in his favour; for being now resolved to settle the point for ever, he threatened war, which the Spaniards not being in a condition to maintain, they made satisfaction for the affront, by recalling *Vat-
teville*, their Ambassador, and making a declaration at *Paris*, before the whole Court, and all the Foreign Ministers, "that their
" Ambassador should never after be present at
" any ceremony where a contest for prece-
" dency could arise between them and the
" *French.* (y)" This Convention satisfied LEWIS, who asserted it in all places afterwards, except at *Vienna*, where the relationship between the branches of the Austrian Family gave the preference to *Spain*. It continued even after it seemed allowed in Europe, that all Crowned Heads were equal; for when Sir William Temple, the mediator at *Nimeguen*, proposed some rules for the observation of the several Ambassadors, indicative of *equality*, the French expressed their acquiescence towards all, except the *Spaniards*, their rights against whom having been

(y) Id. Ib. & Wicquef. i. 24.

settled

settled by Convention, they could not yield; without the exprefs orders of their Master. (z)

This *equality* of the Crowned Heads of Europe seems, according to the last-mentioned author, to have been first broached near the middle of the last century, when the great GUSTAVUS asserted to the Duc de Grammont, Ambassador of France at his Court, that he knew no other distinction among Crowned Heads than what was made by their virtue. An admirable sentiment! and which we may fairly allow to have arisen from the conscious worth of him who conceived it. The pretence, says *Temple*, was not much disputed with him, in respect to the greatness of his qualities, as well as of his attempts and success; and his example was followed by all other Kings. From that time, therefore, although the *French* continued to claim precedence next to the Emperor above all other Sovereigns, yet it was allowed by none, except by the Spaniards (a) It is to be observed

(z) *Temple's Mem.* 1672, 1679.

(a) *Id. Ib.* Some countries, however, yield precedence to others by exprefs treaty. Vide *Martens. Precis du Dr. des Gens.* 1. 163.

also

also, that although, as we formerly mentioned, the Grand Signor has been allowed an equal place with the Emperor; yet the apparent natural consequence of it, namely, his superiority over other European States, has not followed; since they assert, and are allowed, *equality* with the Porte, notwithstanding the Sultan's equality with one who takes the lead of *them*. (b) This seeming inconsistency may be accounted for, partly by the equal titles of *Emperors*, which the *French* and the *English* have assumed at Constantinople; partly from the circumstance, that the equality of the Turk with the Emperor, was obtained by special treaty with him, the rights of other Powers undergoing no alteration.

With respect to the place of other Kings before this time, an attempt to settle it would be as difficult, as the result would be unimportant. I shall not, therefore, pretend to examine a matter, which, as far as I have been able to observe, was never fairly decided; nations for the most part obtaining precedency among one another, as alliances, interest, favour, or relationship between their

(b) Martens, I. 160.

Sovereigns directed. Upon the subject of equality, however, it is to be remarked, that it has never been clearly and solemnly *decided* that all Crowned Heads are equal, but has crept by stealth, as it were, into the ceremonial ; and the contest, for the most part, is rather *waved* than fairly settled. Thus in drawing up *Treaties*, the contest concerning the right of being first named, (a matter which formerly gave rise to much dispute,) is now got rid of, rather than settled, by each party making a copy of the Treaty, in which he preserves all his pretensions, and the two copies are then exchanged. (c)

Thus have we endeavoured to conduct the reader through a part of the Law before us, which, however trifling it may appear, is as difficult to arrange, and productive often of as much serious disquisition as any of the points we have before discussed. From not having been well understood, it was formerly, as we have seen, pregnant with a vast number of claims, which powerfully operated upon the situation of Europe. It was some-

(c) De Callieres. *Man. de Negoc.* i. 232. Martens. i. 164, 169, 170.

times the occasion of war, and always of discussion; and, therefore, however justly it may be despised by superiour minds, which can soar above the common prejudices of humanity, it has the fairest claim to a place in this work. At the same time, I have purposely omitted a great part of that vast body of cases of nicety and dispute, which some authors have been studious to preserve. As facts, which let us into a knowledge of our nature, it may not be improper to read them; but as few of them were determined upon public principles, or known maxims, but leave the points in dispute, considered as public questions, fluctuating in uncertainty; I have, for the most part rejected by design, all those in which nothing seems to have been determined, or determined only *pro hac vice*.

CHAP. XVII.

THE HISTORY OF THE LAW CONTINUED FROM THE
FIFTEENTH, TO THE SEVENTEENTH CENTURY.

WE now resume the thread of the history which we proposed to examine, and which the discussion of the influence of particular circumstances upon the Law before us, had caused us in some measure to suspend. We mean now, therefore, to pursue our enquiries from the fifteenth century, (where it will be recollected we were left by the ninth chapter,) until we come to the birth of those voluminous masses of learning which have appeared under the title of the *Jura Gentium*, and to which, as far as they relate to the European Law of Nations, it would be almost in vain to attempt an addition.

The sixteenth century presents us with an extensive and important change, not only in the affairs, but in the public opinions of Europe. That regular appearance which it bore, of one vast assemblage of States, united together under a common spiritual head, allied by the ties of a common Religion, and governed, almost entirely, by one particular
set

set of maxims, will be found, comparatively, to have faded away. And although, with respect to the rest of the world, it still continued to be insulated, as it were, in the observance of certain particular laws, yet the great breach in RELIGION, caused by the *Reformation*, brought along with it a kind of subdivision of its States, which may be said in some measure to have caused an alteration in its Law of Nations. In a former chapter we observed the great influence upon that Law, which was effected by the *Ecclesiastical Establishments*, and the doctrines of *Christianity*, as interpreted by particular men. The sixteenth century, however, brought to light, and almost to maturity, tenets of a very different nature. The effects of the positions of LUTHER, were by no means confined to mere articles of faith. As they had theological liberty immediately for their object, so they were intimately allied with political freedom; and in the Law of Nations, all that deference which had been paid, and all those privileges which had been allowed to the Pope, as the head and father of the Christian Republic, were completely annihilated among nations adhering to the *Protestant Faith*. This, as might be expected, was not wil-

lingly submitted to, either by the Court of Rome, or its numerous favourers; the two causes became public; nations were ranged under different standards, and mutual and steady opposition became almost a fundamental article of their public law. It must be obvious, that this would beget the greatest innovations in the maxims which had hitherto governed them; and, accordingly, the positions of the *European* Law of Nations came to be ramified into those of the *Roman-Catholic*, and those of the *Protestant* States. Each party affected to make the Evangelical Doctrines the rule of their national conduct; but scarcely so great a difference had existed formerly between *Infidels* and *Christians*, as was now to be found between the Christians themselves. The rage which had been common against the *Turks*, was transferred by the *Catholics* to the *Reformed*; and Excommunications, and Cru-
sades, were the mildest means adopted by them to bring them to reason. The latter, finding themselves thus oppressed, and almost hunted to death by those whom they had considered as brothers, had no resource but in an union among themselves; and causes for war, conduct in its pursuit, behaviour in negotiation,

tion, and the construction of Treaties and Alliances, came thus, evidently, to be both modified and enlarged. Two interests, it is well known, were set up in Europe, which in all the circumstances which could influence the conduct of nations, in their public maxims, and even in their formal acts, divided its communities under the names of *Catholic* and *Protestant*. These terms exist, in all their cogency, to this day; and, as the defence of CHRISTIANITY in general, had been formerly the ground-work of the science of politics, and the fairest *legal* causes for many remarkable points of conduct both in peace and war; so the extirpation of heresy among the *Reformed* by the *Catholics*, and, on the other hand, resistance to the *Catholics* by the *Reformed*, had now become points of equal legitimacy among their respective classes of nations.

Hence in almost all the combinations of force which we find going forwards during the sixteenth century, (although Catholic and Protestant Nations were certainly often ranged together, according as more urgent necessity required,) (*d*) yet for the most part the de-

(*d*) Vide Mem. de Sully. 2, 81, 245.

fence of each religion was assigned as an efficient cause for very strict and extensive alliances. Thus, when Queen ELIZABETH had changed the religion of *England*, and her council had determined that excommunications, formerly so much dreaded, were but as "a senseless lightening," (e) she found herself courted by all the Protestants of the world, and came, not unjustly, to be considered as the head and protectress of that interest. When, therefore, she assisted the Prince of *Condé's* party in France against the *Guises*, she observed, that not to do so, would be "to betray carelessly her own religion, security, and safety." She spoke of it as *the common cause*; she entertained the strictest correspondence with the numerous followers of her faith in Germany; and when she protected the Dutch against Philip, she resolved "that it was Christian Piety" to relieve the afflicted Netherlanders, *Embracers of the same Religion which she professed.* (f)

Another

(e) Camden. 16.

(f) Id. 61, 64, 119, 137, 321. See also a letter of Elizabeth, written in a very vehement strain, to Henry IV. upon his change of religion. *Morlante*, that King's Ambassador, offering, says Camden, all kindness in his Master's behalf

Another, and more palpable effect of this division of Christianity, appears in the reasoning of the same ELIZABETH against the remonstrances of Spain, upon the depredations of *Drake* in the South Seas. *Mendoza*, the Spanish Ambassador, having complained of his failing at all in the Indian ocean, she answered, that whatever appeared to have been taken by *robbery*, should be restored; but that as for commerce in those seas, the Spaniards had prohibited it “*contrary to the Law of Nations*.” That she could not persuade herself that they possessed any just title by the *Bishop of Rome’s donation*, in whom she acknowledged no prerogative in such cases, so as to lay any tie upon Princes *who owed him no obedience*, or, as it were, to infeeble the

behalf, she being much disquieted in mind, snatched up her pen, and wrote as follows: “Alas! what deep sorrow! what vehement grief! what sighs have I felt at my heart for the things which *Mordante* hath told me of! Whereas you do religiously and solemnly offer me your friendship, I know, to my great cost, I have well deserved it: neither should I repent that, had you not changed your Father. Verily from henceforth, I cannot be your Sister by the Father!” She concludes, “Your Sister, if it be after old manner; *as for the new, I have nothing to do with it.*” ELIZ. REG. Id. 475.

Spaniard in that new world. (g) The protection of Drake, in consequence of this reasoning, is well known.

On the other hand, the Papists wrought upon one another by the same sort of arguments; the glory of God was to be upheld by the destruction of heretics, and the bloody maxims of intolercancy were every where enforced.

Of this, many parts of our own history are an ample illustration; and in particular, when the bigotted, or hypocritical PHILIP II. was about to invade England, he was instigated, exclusive of other reasons, by such arguments as these. "That, seeing God had
" blessed him with such exceeding great
" blessings and benefits, he in like manner
" would perform somewhat which might be
" pleasing and acceptable to God. But
" nothing could there be *more* acceptable to
" God than to propagate and enlarge his
" church. That the church of God could
" not be more gloriously or meritoriously
" propagated, than by the conquest of Eng-
" land, and replanting the Catholic Roman

(g) Id. 255.

" Religion

"Religion and abolishing heresy there." (b) So also, when Parry and others had undertaken at various times to assassinate ELIZABETH, and wavered in their undertaking, they were confirmed in it, the one by *absolution* from the Pope, the other by Babington, who laboured to prove to them, that if ever Equity and Justice could be violated, it was to be done for the promotion of the Catholic religion. (i) In the same spirit, the massacre of St. Bartholomew was called a *Remedy* by De Gondi, the French Ambassador in England, (k) and in the Bull of excommunication against the Queen, she is denominated "pretended Queen of England, and the servant of wickedness." (l) Trusting to this Bull and the efforts of so powerful a minister of his commands as PHILIP, the Pope had conceived the design of setting one of his nephews on the throne of *Ireland*, and exercised before

(b) Camden, 402.

(i) Camden, 307, 339.

(k) Id. 192. It is somewhat curious to remark the long life of Bigotry. If what the author has been himself told at Toulouse be true; processions of thanksgiving were made till within a very few years in that city, in gratitude for this *remedy* of St. Bartholomew's day.

(l) Camden, 145.

hand the rights of Sovereignty by creating *Stukely*, the adviser of the plan, *Earl of Wexford* and *Caterlough*, *Viscount Morough*, and *Baron of Ross*. (m)

But however divided the *Christian* States may appear to have been among one another, they had not lost sight of those marked distinctions which Religion had placed between them, and the Infidel followers of MAHOMET. The *Crusades*, indeed, had been laid aside from impotency, but the Turks were still considered as the common enemy; and hence when the news of the issue of the battle of *Pavia* was communicated to CHARLES V, he affected rather to lament the wound which had been given to *Christendom*, by the misfortune of one of its bravest Monarchs, than to rejoice at his own success; he forbade all public festivities, and pretended to wish for an union with his enemies, in order that they might act with greater energy against the common foes of Christianity. (n)

On the other hand, notwithstanding the Treaties which, about this time, as we have

(m) Camden, 230.

(n) Robertf. Char. V. 2. 299.

seen, began to be made with the *Ottomans*; those fierce barbarians continued to enforce their savage maxims against *Europe*; and such was their contempt, that when the French Ambassador at the Porte communicated to the grand Vizir that his Master had beaten the Spaniards; "of what importance is it to me," replied the Minister, "whether the Dog worry the Hog, or the Hog the Dog." (o) Their proceedings towards public Ministers at their Court, were governed for a long time by this spirit; a writer of the last century asserting, what is proved in a great variety of cases, that the reason why Ambassadors from *Christians* were allowed to reside among them was, in order to have in their possession *Hostages* for the performance of Treaties, and on whom they might revenge their infraction. (p) They were the more inclined to consider them in this light, according to the last mentioned author, from the idea which they entertained that Ambassadors were always possessed of some *secret* instructions, which it behoved them to know before they would transact business with them;

(o) Rycault.

(p) Wicquef. De l'Ambass. i. 486.

but which they never could arrive at, as long as they gave into the general maxims of Europe concerning their inviolability. (q) They seem therefore for a long time to have considered *Christian* Ambassadors, as liable to every the most capricious exertion of their power, and their treatment of these privileged Ministers, (r) forms a gross and cruel exception to the laws concerning them, which as we shall have occasion to observe, were received and acted upon by all Europe. That it arose chiefly from the spirit which animated the two Religions against one another, may also be fairly supposed, because the *Alcoran* enjoins the good treatment of the *Elchi*, or public Ministers; and in their intercourse with the powers of their own *Class*, the

(q) Mem. touch. les Ambass. 117. This idea of the Turks was founded upon some intelligence which they once received of the *Secret Instructions* of *Badovere*, Ambassador from Venice, 1536. The Republic had sent him to treat of peace, the price of which, in his *public* instructions, was to be *money*. He was however *secretly* instructed to offer three cities in the *Morea* in case money was refused. The Porte, having information of this, insisted upon seeing the *Secret Instructions*, and forced *Badovere* to make peace according to them. Id. Ib.

(r) Vide Wicquef. De l'Amb. 1, 395. Mem. touch. les Ambass. 115, 116, 120.

Turks

Turks proceeded differently with respect to those characters. (s)

Within this period, among the States of Europe, began that remarkable and characteristic custom, of entertaining *Ordinary* or *Resident* Embassies at one another's Courts: an institution peculiar to themselves, and particularly evincive of those many distinctions which there are between their Law of Nations, and that of other sets of people.

The right of sending Embassies on *extraordinary* occasions, is as old as Society itself. There are scarce any customs which begin sooner to appear, nor is there a tribe of savages so low in the scale of Humanity, as not to feel the necessity of adopting them. It may therefore almost be said to amount to a *natural* right; (t) certainly, at least, the intercourse of mankind would be for ever retarded, if the attempts of nations to communicate with one another, were attended even with the apprehension of insecurity. Hence the universal opinion concerning the sacred-

(s) Wicquef. ut sup.

(t) See Vattel, 2. 5. 65.

ness and inviolability of the character of an *Ambassador*, within the territories of those to whom he is addressed. Hence also, the impossibility of refusing fairly to *bear*, at least, any thing by way of *proposal*, which one State may have to communicate to another. All this, however, does not amount to that right or custom, now so universal in Europe, of entertaining public Ministers for a regular continuance of time at the Court, and in the Cabinets, as it were, of each other; a circumstance remarkable in itself, and unknown to almost all other nations.

It is to the great and peculiar intimacy of the European States, arising from a vast variety of causes, a great part of which we have been endeavouring to detail, that this particular custom must be chiefly attributed. The nations of *antiquity* knew nothing of it; It is equally unknown to the uncivilized, and to most other nations, out of Europe, in modern times. The ties of one common Religion; the assemblage of Princes in one grand Council, to protect a common interest; the custom by which property and dominion could pass from one people to another by marriage;

marriage; the common laws of a great feudal system; the general cultivation of Commerce, for the most part the growth of *Treaties*; the numberless factitious rights, created by positive Convention; and above all perhaps, the wonderful and jealous attention which has for a long time been paid among us, to that part of our policy (generally considered as legitimate) which is known by the term of the *Balance of Power*; all these, as we have seen, conspired to render the connections of the *European States* peculiarly close and binding.

Few, or none of these reasons could apply to the *antients*; and the ignorant, or deliberate policy of most of the moderns (other than European) make it equally inapplicable to *them*. From the slight view which we took of the Law of Nations of other classes of people, it was found that there was little friendly communication among them; certainly, little opportunity of cultivating or extending among *individuals*, those numerous liens which must naturally be continually arising from the circumstances above mentioned. The two of those circumstances most

likely to have existed elsewhere, namely, Commerce, and the System of the Balance of Power, were but little known to the politics of the Romans, or their neighbours. Those Giants of their time, despised both the one and the other; and, what is remarkable, their opponents, whether in Asia, Africa, or Greece, do not appear to have paid that attention to them which they deserved. The progress of any one power was not foreseen so long before hand, as to render it necessary for them to settle that combination of alliances and interests, which so peculiarly distinguished the nations of *Europe*, and which render it scarcely possible for one to move, without sooner or later involving all the rest. With respect to Commerce; though much cultivated for the sake of enjoying the produce of the arts, it was but seldom considered as a national fund, or the vehicle of power. The Romans notoriously held it in contempt; during the Commonwealth they were not known to make one law in its favour; (*u*) and they actually inhibited, afterwards, a communication with foreign merchants, lest they

(*u*) Taylor's Civ. Law, 496.

should disclose the secrets of the interior. (w)
 A policy, in which they have been long and
 strictly imitated by the *Chinese*. (x)

Among such a people, there could be little necessity for a standing regular communication; their intercourse was temporary, and their embassies confined to *extraordinary* occasions. In Europe, on the contrary, not only *sovereigns*, but even *individuals*, have long had so much, and such intimate connection, that a constant communication of necessity prevails. Almost all the crowned heads are allied in blood, and the politics of various Courts are so interwoven together, that it has become necessary to have agents perpetually on the spot. (y) Commerce, in particular, has been so eagerly cultivated, that the subjects of one country are spread over the face of ano-

(w) Codex, L. 4. Tit. 63. L. 4.

(x) It is to be hoped, however, that even our own age may remove the foundation of this remark, and that Peking may soon see a *resident English* Ambassador.

(y) Mere curiosity to know what is going forward, without any personal business to transact, is said to be a reason which inclines the Venetians to receive these Embassies. Amelot. de la Houffe, i, 131.

ther, and every community receives within its pale the citizens of all other communities, with friendship and respect. As these, however, would be in a situation peculiarly unprotected if left to themselves, and occasions might perpetually arise in which it would be necessary to appeal to the weight and dignity of their own states; there was a farther reason for establishing regular and standing embassies, as the channels of intelligence, and the representatives of power. Hence the rise of Ambassadors in *ordinary*.

It must be obvious, however, to the historical reader, that the growth of these reasons was slow. Many of them have been traced in the preceding chapters; the balance of power was scarcely thought of, till the contests for Italy arose between France and Spain in the fifteenth century; and the improvements in navigation and discoveries in the *East* and *West*, gave its peculiar spring to *commerce* about the same period. The custom, therefore, we speak of, could hardly have been known before, and it is mentioned accordingly by *Wicquefort*, as commencing not above two hundred

hundred years before the seventeenth century. (z)

Ambassadors in *Ordinary* have been attributed by some to FERDINAND the CATHOLIC, whose policy led him to entertain them at various courts, as a kind of honourable spies: (a) by others, with no small probability, to an imitation of the Pope, who had long been in the habit of sending *Nuncios* to *reside* at various courts in the service of religion. (b) But, whatever was their origin, the Jurists seem to agree that they are not of natural right; (c) and, however universal they may since have grown, doubts, about the period before us, were apparently entertained of their utility. HENRY IV. of France, while King of *Navarre*, entertained none at other Courts; and Henry VII. "that wise and politique King," says Lord

(z) Wicquef. De l'Amb. i. 8, 367, 380.

(a) Fred. Marflaar. De Leg. 2. 11.

(b) Barbeyrac. Præf. ad Bynk. De For. Leg.

(c) Grot. D. J. B. et P. 2. 18. 3. 2. Optimo autem jure rejici possunt, que nunc in usu sunt Legationes *assidue* quibusquam non sit opus docet mos antiquus, cui illæ ignoratæ.—See also Wicquef. i. 8. 367, 380. Vattel. 2. 5. 66.

Coke, "would not in all his time suffer Lieger, "Ambassadours of any foreign King, or Prince "within his realm, nor he with them; but "upon occasion used Ambassadours," (d) So late as 1660, a Member of the Polish Diet asserted, that the Ambassador of France had no cause of residence there, and that as he did not return home, *according to the custom of Ambassadors*, he ought to be considered as a *spy*. Two years afterwards, the Deputies proposed very warmly to send home all Ambassadors whatsoever, and to make a law regulating the time of their stay; (e) and even the Dutch, who, one would imagine, had greater reason than the Polish nobles for encouraging an intercourse with foreigners, debated in 1651, how far this sort of embassy was of any advantage to them. (f) The greater part of nations, however, have now admitted their necessity; and though at the commencement of the period before us, men had affixed no precise ideas to what was considered as a

(d) 4th Instit. 155. They were called Lieger, from Legger, or Ledger, (*Dutch*) To remain in a place.

(e) Wicquef. 1. 8.

(f) Bynkerkh. De. For. Leg. C. 1.

novelty, and even now the admission of these embassies cannot be demanded as a matter of law; yet the custom is so general, and they are considered as so much of course, that the friendship of States can hardly be maintained without them. Not to send them therefore has been sometimes regarded as an affront. (g)

The power, however, of remaining for so long a time together at one Court, gave occasion to innumerable opportunities of acting to its prejudice. An Ambassador was thus enabled to become acquainted with the characters of the men in power, and of the nation at large; he could observe their resources, their objects, their factions; he had time to introduce himself into all their designs; to tamper with their honesty, and thereby, if his master's interest required it, to shake the very government itself. Many foreign Ambassadors have been known to do so, more particularly at this

(g) *Hodie tamen ita usurpantur, ut sine illis, amicitia vix stabilis inter populos diversos coli videatur, etsi nec minus usum habeant exploratorum.* Hub. De Ju. Civ. L. 3. c. 12. See also Mem. touch. les Ambass. 25. where Charles I. of England expresses his resentment against the Dutch for not sending a resident Embassy to his Court.

period of the augmented business and interests of Europe; means were naturally sought for to resist them; and about the middle of the sixteenth century, a great and solemn question was debated concerning the inviolability of Ambassadors in general, the account of which will form the next object of our speculations.

In the year 1567, *Leslie* Bishop of *Ross*, came to the Court of England, in behalf of his mistress the unfortunate Queen of Scots; who, although she was detained prisoner by the English, was allowed to send him, to plead before the Commissioners appointed to examine into her cause. Nothing was determined by the commission; (b) but *Leslie* continued at Court, and exercised the office of Ambassador of *MARY* for the space of one year, when, being concerned in raising a rebellion against the English Government, he was committed to the custody of the Bishop of *London*. From this he was soon liberated, and returning to his function of Ambassador, continued to preserve it near two years longer. At that time, being

(b) Camden 113.

detected in the attempt to raise a serious conspiracy in favour of MARY against ELIZABETH, he was once more committed; and the following questions concerning him, as appears from Lord Burleigh's State Papers, were propounded to David Lewis, Valentine Dale, William Drury, William Aubrey, and Henry Jones, learned civil lawyers.

I. "Whither an Embassador procuring an insurrection or rebellion in the Prince's cowntrey, towarde whome he is Embassador, is to enjoye the priviledge of an Embassador?"

II. "Whither he may not, *Jure Gentium* et Civili Romanorum, be ponished as an enemy, traitor, or conspirator, ageinst that Prince, notwithstandinge he be an Embassador?"

To these two questions they answered:
"Touchinge these two questions, we are of opynnyon, that an Embassador procuringe an insurrection, or rebellion, in the Prince's cowntreytowards whome he is Embassador, ought not, *Jure Gentium*, et Civili Romanorum, to enjoye the privileges, other-

“ wife dew to an Embassador; but that he
 “ maye, notwithstandinge, be ponished for
 “ the same.”

III. “ Whither, if the Prince be deposed by
 “ the comen Authentie of the Realme,
 “ and an other elected and invested of that
 “ Crowne; the Sollicitor, or Doer of his
 “ causes, and for his ayde, (although the
 “ other Prynce do suffer such one to be in his
 “ Realme) is to be accompted an Embassador,
 “ or to enjoy the privilege of an Embas-
 “ sador?”

To this they answered “ We doe thinke,
 “ that the Sollicitor of a Prince *lawfully* de-
 “ posed, and an other beinge invested in his
 “ place, cannot have the privilege of an Em-
 “ bassador, for that none but Prynces, and
 “ such other as have Soverayntyte, may have
 “ Embassadors.”

IV. “ Whither a Prynce, comynge into an
 “ other Realme, and remayning there under
 “ custodie and garde, ought, or may have
 “ there his Sollicitor of his causes, & yf he
 “ have,

" have, whither he is to be cownted an Em-
" bassador?"

To this they answered, " We doe thinke
" that a Prynce comynge into an other
" Prynce's Realm, and beinge there under
" garde, and custodye, and remayninge still a
" Prynce, *may* have a Solicitor there; but
" whither he be to be accompted an Embas-
" sador, that dependeth on the nature of his
" comyssion."

V. " Whither if such a Solicitor be so ap-
" pointed by a Prynce so flyenge, or comynge
" into an other Prynce's Realm; if the Prynce
" in whose Realm, the Prynce so in Garde,
" and his Solicitor is, shall denownce, or cause
" to be denowned, to such a Solicitor, or to
" such a Prynce under custodie, that his said
" Sollicitor shall hereafter be taken for no
" Embassador; whither then such Sollicitor or
" Agent can justly clayme the priviledge of
" Embassador?"

To this they answered, " We doe thincke
" that the Prynce to whom any person is sent
" in message of Embassador, may for causes
" forbidde

"forbidd him to enter into his lands, or,
 "when he hath receyved him, comaunde
 "him to departe; yet so long as he doth re-
 "mayne in the Realme, *and not excede the*
 "*bounds of an Embassador*, he may clayme his
 "privilege as Embassador, or Sollicitor,
 "according to the qualitie of his comission."

VI. "Whither, if an Embassador be con-
 "federacy, or be ayder, or comforter of any
 "traytor, knowinge his treason towarde that
 "Prynce, towarde whome, and in whose
 "Realme he pretendeth to be Embassador; ys
 "not punishable by the Prynce in whose
 "Realme and ageinst whom such treason
 "is committed, or confederacy for treason
 "conspired?"

And to this they answered, "We doe thincke
 "that an Embassador aydinge and comfortinge
 "any traytor in his treason towarde the
 "Prynce with whom he pretendet h to be
 "Embassador in his Realme, knowinge the
 "same treason is punishable by the same
 "Prynce ageinst whome suche treason is co-
 "mytted." (bb)

(bb) See Burleigh's State Papers, by Murden. 18.

These

These answers of the Civilians were supposed to be so decisive in favour of the intentions of the Court, that the Bishop was sent for from his confinement in the Isle of Ely, and after being sharply rebuked, was told he should no longer be considered as an Ambassador, but severely punished as one who well deserved it. He, however, answered with much firmness and apparent knowledge of the law of nations, that he was the Ambassador of an absolute Queen, and of one who was unjustly deposed, and had, according to his duty, carefully endeavoured to effectuate the delivery of his Princess, and the safety of both kingdoms. That he came into *England*, with the full authority of an Ambassador, upon public *warrantise*, or safe conduct, which he had produced; and that the sacred privileges of Ambassadors were by no means to be violated. *Burleigh* in return, observed that no privilege or public warrantise could protect Ambassadors that offend against the public Majesty of a Prince, but they are liable to *penal actions* for the same; otherwise lewd Ambassadors might attempt the life of princes without any punishment. The Bishop persisted in his positions, and maintained that the privileges of Ambassadors

Ambassadors had never been violated *via juris sed via, facti*, not by regular form of trial, but by violence. (i) This boldness, or the true view which he seems to have taken of this nice subject, appears so far to have weighed with the Ministers of ELIZABETH, that they did not dare to put him to death, with the Duke of Norfolk and other conspirators, but after detaining him for some time in prison, banished him the country in 1573.

This curious case was ever afterwards the ground work of much disquisition in the law of nations. The opinions of the five Civilians above recited, did not long continue to be orthodox; and however some sages of the law of *England* may have formerly determined for that particular country, the best professors of the Law of *Nations* have held, that whatever crime an Ambassador may commit, whether against the positive municipal law of the land where they reside, or against the general law of *nature*, though it may be right to treat them as an *enemy*; that is, as if they were in open hostility, yet neither ought more vio-

(i) Camden 169.

ence to be shewn than the necessity of self-defence exactly requires, nor can they ever be made subject to any sort of judicial process whatever.

As this may appear extraordinary to the bulk of those who have not taken a view of the opinions on the matter, and to many who have even turned their minds to these points; it will be necessary, perhaps, to take it up as high as we are able, and to go through the whole subject of inviolability in general. We may then examine the authorities on this particular question, by which it will appear how far this opinion is made to extend, the doubts that were formerly entertained upon it, the cases that have actually happened, and the amount of what has actually been determined by those cases.

With respect to the general point of inviolability, it may be necessary to premise that it admits of two divisions, I. as it merely concerns the superiour protection and privilege which Ambassadors have been allowed to enjoy. II. as it carries, along with it, an exemption from the civil and criminal jurisdiction

dition of the country where they reside, all which we have seen, was positively asserted by the *Bishop of Ross*.

As to the first point, there has been at all times thrown about the person of an Ambassador, a certain sacredness which seems to have been generally allowed by every nation capable of sending or receiving one; and it is to be deduced as a natural consequence of that necessity which induces men to receive embassies at all. For it is one of the first laws of mankind that they should seek an intercourse with one another; their love of society and their mutual wants demand and insist upon it. But if they have a right to the end, they have also a right to the means, and every necessary immunity to those persons who are chosen as the instruments of communication, must be a natural consequence of the consent to encourage that communication. But this immunity will, for the most part, amount to protection far greater than that enjoyed by the common subjects of the state. An Ambassador neither knows, nor submits to the laws of the country to which he is sent; he goes not on his own account,

on private business, or private pleasure; but as the representative of another; as the presentation of the dignity, privileges, power, and rights which others *would enjoy*, had they continued within their own precincts. And thus, by consent, and a sense of mutual advantage, he is allowed to represent and personify, if I may so call it, all these high privileges in the very bosom of another community, for the sake of transacting better the whole business of the world. But this, as is obvious, could never be, if such a representative were to be considered, as no other than a common subject of the land to which he is sent; as one, merely enjoying the protection of such laws as prevail, which in many cases may be no protection at all. Hence, the peculiar sacredness which the laws of the world have thrown about the persons of Ambassadors; and the indulgencies above all other men, within the same community, which, from the most antient times, they have been suffered to enjoy.

Of this we have examples in the oldest histories, and in almost all codes of law; and among the rest, an eminent one in the Jewish story,

story, where *David's* messengers to *Hanan* King of the *Ammonites*, being treated with contempt and insulted by that prince, whom they were sent to console on the loss of his father, it was the cause of dreadful war between the nations, in which seven and forty thousand of the *Ammonites* were destroyed. (k) So also the great rage expressed by *Xerxes* against *Athens*, which ended in the entire destruction of that city in the Persian invasion, was said to be owing to their violence towards his Ambassadors though coming with an hostile message. The sack of *Rome* by *Brennus*; of *Corinth* by the *Romans*, and of *Philomela* by *FREDERICK BARBAROSSA* in the thirteenth century, was the consequence of the same sort of conduct. Hence, also, those various marked passages in the *Digest*, and the works of different Roman lawyers, which all tend, in the most explicit terms, to enforce this necessary doctrine. The *Arabians*, the *Chinese*, the *Indians*, and the *Mexicans*, are all found to unite in it, (l) nor is there scarce a point in morality more generally received; the exceptions to it being

(k) 1 Chronicles. chap. 19. (l) See Vattel, 2. 284.

few in number, and chiefly to be found among the Turks, upon the reason for which we have already observed.

The cases are indeed innumerable, in which the security of public Ministers is peculiarly provided for above other men, and the rule seems to be, that every privilege should be bestowed upon them, *the want of which would interfere with the purposes of the Embassy.* (m) Thus, it seems universally agreed, that a public Minister and his Suite, shall always be exempt from every sort of law process in the nature of a civil action, from the just fear that their being liable to be so called upon, might perpetually engage their attention from matters of higher import to their nation. Nor is this the injustice, which at first it may be imagined, to the subjects of the country where they reside; since, as their privileges in this respect are *known*, it is at their own peril that any one puts a confidence in them. (n)

So universal is this exemption among the *European States*, that where a particular con-

(m) Bynkerfh. De For. Leg. c. 6.

(n) Vide Grot. D. J. B. et P. 2. 18. 9, 10.

situation does not allow the Prince a discretionary power in these matters, the laws have generally taken it into their consideration, and brought the country to a level with the universal Law of Nations upon the point. Thus, it being found in *England* in the beginning of this century, that there was no legal punishment for those who violated the privileges of an Ambassador; the 7th of Ann. c. 12. was passed, by which the matter was put out of doubt; and whoever now dares to sue out any process against any public Minister, or his domestics, are deprived of their trial by jury, and if convicted of the same by the oath of one or more witnesses, before the Lord Chancellor, and the two Chief Justices, or any two of them, "they are to be deemed violators of the Law of Nations, and disturbers of the public repose, and to suffer such pains and penalties and corporal punishment, as the said Lord Chancellor and Chief Justices or any two of them shall judge fit to be imposed and inflicted." Thus these magistrates, according to Blackstone, have an *unlimited* power to proportion the punishment with the crime. (a)

(a) Commentaries, 4. 71.

The occasion of the Statute was the well known arrest of the Russian Ambassador on the 21st July 1708, who being upon the eve of his departure, and indebted to Thomas Morton, a laceman, and various other tradesmen, they resolved to arrest him according to the ordinary forms of law. This was done with some circumstances of aggravation, for the Ambassador, thinking himself attacked by Russians, defended himself, but was overpowered, and ill used by the Bailiffs, who carried him to a spunging-house, where he was detained till the Earl of Feversham bailed him. He immediately complained to the Queen of this violation of the Law of Nations, and the Count de Gallas and the Baron Spanheim, Ambassadors of Sweden, and Prussia, together with several other foreign Ministers, joined in the complaint. The Queen was indignant at the affront, and Morton, the attorney, and all who were concerned in the arrest, to the number of seventeen, were committed to custody, and ordered to be prosecuted with the utmost severity of the law. Most of them were brought to trial, on an information of the Attorney General, and were found guilty of the facts, though the question, how far

those facts were criminal, was reserved to be argued before the Judges; which question was never determined. (*p*) Mr. Boyle, the Secretary of State, writing to the Ambassador, speaks of the attempt as "desperate and dismal," and the Privy Council were several times summoned to consider of his satisfaction. (*q*) As far as punishment, however, was concerned, none could be obtained, and the affronted Minister was forced to be content with his liberty, the reimbursement of his expences, and the enactment of a law, by which the above-mentioned provisions were made in future. (*r*) The preamble, however, having merely observed, that the *Muscovite* Ambassador had been taken out of his coach by violence, in contempt of the protection granted by her Majesty, *without taking notice of the breach of the Law of Nations*, "which is

(*p*) Black. Comment. i. 255.

(*q*) Tindal. Contin. of Rap. 4. 103. fol.

(*r*) Mr. Addison, writing on this subject to Lord Manchester at Venice, observes, "Your Lordship knows that the privileges of Ambassadors are under *very little regulation* in England, and I believe that a bill will be promoted in the next parliament for setting them upon a certain foot, &c. &c." Cole's State Pap. 546.

superior and antecedent to all municipal laws;" the foreign Ministers in London met again together, and procured the addition of these words, "Contrary to the Law of Nations" and in prejudice of the rights and privileges which Ambassadors, and other public Ministers, authorised and received as such, "have at all times been thereby possessed of, and which ought to be kept sacred and inviolable." (s) With this Act of Parliament elegantly engrossed, and an apology for not being able to punish the persons of those who had affronted his Minister, the Czar, who at first insisted upon their deaths, was at length induced to be content; and thus ended this delicate affair. We may observe upon it, however, that although it was thought necessary to quash the proceedings against the *Muscovite* by this express act, yet nothing was absolutely decided upon the old law of the land, as it might be supposed to relate to the validity of a process against an Ambassador. All that was settled with certainty, was the impossibility to punish those persons who made the arrest, and the nullity of such arrests in future. No precedent had been known by which such detentions had been authorised, or

(s) Tindal, 4. 118.

even attempted ; and a question therefore may not unfairly be raised, how far the law of England, even before this time, ever permitted what it calls in the Statute, " a Violation of the Law of Nations." *Comyns*, though he mentions not the punishment of their infraction, yet seems to hold that all process against Ambassadors was void, even before the 7th Ann ; since in laying down the law of Ambassadors, he quotes the opinion of *Grotius*, concerning their immunity, before he comes to mention the statute. (r) And it is therefore not improbable, that he thought that opinion was a part of the common law of England, although much elucidated and strengthened by the statute. *Blackstone* asserts in terms, that the common law of England recognizes the rights of Ambassadors in their full extent, by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign Minister, or any of his train ; " the more effectually to enforce which," he continues, " when violated through wantonness or insolence, it is declared by the statute 7th Ann, &c. &c."

(r) *Comyns* Dig. Art. Amb. B.

Hence

Hence it should appear, that in his opinion, the statute did not create any *new* law, except as far as the punishment of the persons violating the Law of Nations was concerned; and that the rest was merely *declaratory* of what the common law had always been. (u) Which-ever way this may be, in other times, probably, the violators of the law would have been severely punished, even without such a statute, as may be collected from the following case. In the year 1627, one *Philip Weiseman*, a German, who was a kind of Purveyor to foreigners in England, having bargained to defray the Ambassador of Denmark's expences at a certain rate from Paris to London, made some unreasonable demand upon him on his arrival at the latter place, and that, says *Finet*, "with much touch to his honour." The Ambassador complained to the Lord Chamberlain, who acquainting the King, order was made for the Lord President of the Council, the Lord Chamberlain, and the Vice Chamberlain to "*bear and determine*" the business. The cause was examined, and the following record and sentence was the consequence.

(u) Comment. 4. 79.

“ Henry, Earle of *Manchester*, President of
 “ the Privy Councill of his Majesty of Great
 “ Britain; Philip, Earl of *Montgomery*, Great
 “ Chamberlaine, and of the Councill of State
 “ to his said Majesty, being Commissioners
 “ and Deputies for his said Majesty to heare
 “ the protestation which the Lord *Rosenbranc*,
 “ Ambassador Extraordinary to his Majesty of
 “ Denmark, shall make aganst *Phillip Weiseman*,
 “ for certaine injuries and calumnies which he
 “ should speak and write aganst his person, in
 “ prejudice of the honour of the King his
 “ master, and of his own particular reputa-
 “ tion; having by expresse commandment from
 “ his Majestie adjourned, and examined the
 “ foresaid *Phillip Weiseman*, and having un-
 “ derstood at the same time, by confrontation,
 “ some of the domestiques of the said Lord
 “ Ambassador, and others; as also examined
 “ his letter to the said Lord Ambassador: we
 “ finde that the said *Phillip*, without any reason
 “ or cause, having received more monies than
 “ were agreed upon, according to his own con-
 “ fession, hath maliciously and impudently
 “ blazed abroad, such words and writings,
 “ without having regard to the honour of the
 “ person whom he presents, or to his own par-
 “ ticular

“ ticular quality : Therefore we have inor-
 “ dered that he be put in safe custody, untill
 “ he give satisfaction to the foresaid Amba-
 “ sador, *if he thinks it not fit to bring him be-
 “ fore the King his master, to be punished ac-
 “ cording to his demerit.* In faith whereof we
 “ signe this present instrument this 14th of
 “ April 1627. *Manchester — Montgomery —
 “ Carleton.*”

“ The fellow,” continues *Finet*, “ persisting
 stubborn and most averse from submission, was
 after four or five days restraint in the house of
 a messenger, delivered by a warrant from the
 Lord President, and the Lord Chamberlaine,
 from the Messenger’s hands to the Ambassa-
 dor’s; who, causing him to be imprisoned in
 the counter, by virtue of the said warrant,
which gave him power to dispose of him, he was
 upon the point of being sent to *Hamburg*; but
 his stomach lessening, and his submission made
 with acknowledgment of his guilt, both by
 word, and writing, he was at last set at
 liberty.” (*) And here we shall close what
 we have to say concerning the exemption of

(*) *Finet. Puntillos of For. Amb. in Eng. 204.*

Ambassadors from the *civil* jurisdiction of the country where they reside.

Concerning their exemption from the criminal jurisdiction, in case they violate either the positive laws of the land, or the general law of nature, much more is to be observed; nor is there perhaps a subject of greater nicety, within the whole scope of the law before us.

Certainly it may at first startle us, to think that a human creature, a foreigner, a bad man, or a fool, shall have it in his power to come into our country, and be guilty of riot and disorder, raise rebellion, or commit murder, and shall afterward set the arm of the law at defiance, merely because he is cloathed with a representative capacity. It can never, it should seem, be intended, by the custom of nations, that inviolability should extend so far; for in that case it would indeed be in the power of lewd Ambassadors, according to Lord Buryleigh's expression, (y) to attempt the life of Princes, and to plead privilege from punishment. But neither the one nor the other is

(y) Ub. Sup.

the intention of the Law of Nations, as we shall presently see.

The whole reasoning upon this subject may receive much light from the *general* doctrine of inviolability, which may be reduced shortly to this; that although one of the first principles concerning civil society is, that every creature, within the pale of a community, should, for the sake of the common good, be amenable to its laws; yet that for the sake of the same common good, cases may and must arise, which may form an exception to the general rule, and it may therefore sometimes be permitted, that either one man, or an order of men, may be deemed absolutely exempt from all jurisdiction whatsoever, either for ever, or *durante officio*, according to the different forms of the constitution.

This is eminently proved by the nature of the place of a Sovereign; the inviolability of which is a part of its very being. By the place of a Sovereign, I mean not any particular form of power, or any particular division of it. I mean not a *King*, an *Oligarchy*, or a Democratic Council, or a mixture

of all three. I mean, simply, that power in a State, which, according to the shape of its constitution, is, while it lasts, SUPREME. It is evident that such a power must be inviolable, or there would be a contradiction of terms; and not only this, but a possibility, every moment, of destroying, not merely the Government, but the Constitution; for no Constitution can contain a provision for its own destruction.

To be a little more particular on this subject, let us suppose the case of a *Public Functionary*, invested with the *supreme* executive power of a State, without appeal. It is clear that he must be inviolable, whatever breaches of the law he may commit; for if he is not so, he is liable to be tried somewhere, and that power which tries him must itself be supreme above him; but he himself was supposed to be supreme, and the two are totally incompatible. It is very true that there are *Functionaries* who may be, and have been made, amenable to particular tribunals in the State; but such *Functionaries* are evidently not *Sovereigns* in the pure sense of the word; and any objections therefore, founded upon
this

this, can have no force. It is also very true, that the Constitution may be such as to vest the Sovereign power in the same hands, only for a certain time ; in which case the Functionary may be tried for misconduct, *after he has laid down his office* ; and this is the only remedy which a people can *legitimately and formally* have against a tyrannical ruler. But neither can this apply to those Sovereigns that are *hereditary* ; nor does it at all impugn the idea of inviolability *durante officio* : For could either the hereditary, or the temporary Sovereign, be deprived of his power, *durante officio*, and then made answerable ; the whole absurdity and incompatibility of the two ideas would revive ; the Sovereignty, it is evident, would no longer exist ; that power which could have the right to *deprive* the Functionary of his station, (let his crimes be what they would) being plainly above him.

This doctrine will pervade every part of the subject, and every case that can possibly be supposed ; nor is there any refinement, nor any invention which can get rid of it. It is a radical defect, if you will, incident to every scheme of Government, but it is a defect which

which it surpasses the limits of human understanding to cure.

Under our own Constitution we have secured ourselves from any *legal* pretence in the Sovereign, to rise above the laws; not only by the *implied* doctrine of a compact between the King and the People, but by an actual compact, entered into and confirmed by a *positive oath*, to execute the laws. Now let us suppose, what is not the case, that it was allowable for the State to remove him from the throne, in case he broke his oath; still it would be impossible to erect any *Judge* of the case wherein he had done so, without annihilating the idea of his independent Sovereignty. For the Judge, so constituted, would be more sovereign than the Sovereign, which is absurd; or if, for the sake of getting rid of the contradiction of terms, we say that he would be more sovereign than the *Functionary*; he would himself be the Sovereign of the land; he would control the controller; he would be the sole judge of the case *when* the King had broken his oath, and he could abuse that power at pleasure, since no check over him could be supposed, without beginning

ginning again the same chain of difficulty, and ending again exactly where we had begun.

The *French*, in their constitution of 1791, in which there is so much to praise and to condemn, endeavoured to fix a case of this kind, in which the attempts of an *hereditary* Sovereign might be *legally* punished by dethronement. They enacted, "That if the King
" should put himself at the head of an army,
" against the nation, or would not oppose by
" a formal act, any enterprize of the kind,
" which was made in his name; or if, being
" out of the kingdom, he did not return
" within a time appointed by the legislative
" body, which should not be less than two
" months; in these three cases, that he should
" be deemed to have abdicated the king-
" dom." (z) They did not, however, attempt to say expressly, with whom it lay, to declare, *according to law*, that the abdication was made. And yet such *legal* declaration would be absolutely necessary, to give legal

(z) Vide. Art. 6 & 7. S. 1. Ch. 2. T. 3. of the Constitution Françoise, 1791.

authority to any proceedings which might be founded upon it; and even if we suppose, what is natural, that they meant the legislative power to make such *legal* declaration; it is evident that the *Legislative* power, was thus the Sovereign of the *Executive*, for if it pronounced this abdication upon a *false* pretence, there was no power in the State to call it to account for it.

But are we really then to suppose, that the Sovereign of a State is actually so omnipotent, as to be incapable of being resisted? Is he to be allowed to trample upon all the rights of those whom he governs; to set up power as right, and caprice as law? Or, if there are laws which he cannot alter, is he to be permitted to break them at pleasure, and to find security for every sort of crime?

We answer, that as long as the *Constitution* is preserved, we are left without remedy; for no legal remedy is it able to supply. If therefore, goaded by the insults and injuries of a *Monster*, we are driven beyond our patience; our resource is, not *in* the law, but a *violation* of it; not in the *constitutional* punishment, or
riddance

riddance of the Tyrant, but in the absolute *illegal* destruction of the Constitution itself; for such is every successful rebellion, and every forcible change of the *legitimate* Sovereign. And hence, in case of failure in our resistance, even to a Sovereign who endeavours to set himself above the laws, the consequences must be upon our own heads; for no one can say, not merely that the law has not, but that it *ought* not to have the power to punish us. (a)

The Revolution of *Great Britain* in the last century, furnishes inexhaustible food for speculation. I will venture one, which I do not remember to have seen. JAMES was equally the violator of his compact with *England* and with *Scotland*; and he was driven away, by the same means, from both countries. In the first, however, the *Constitution* was preserved. In the last, it was absolutely broken. In *England*, the throne was declared *vacant*, which was an actual fact; (however rebellious the means which

(a) It was this no doubt that made the veteran Sir John Maynard bid the Revolution Parliament *beware*, since they debated with an halter about their necks.

procured it,) and the Parliament did nothing more than exercise its *constitutional* functions of *filling up* the vacancy. In *Scotland*, the Parliament did, what, according to us, it never could have the *legal power* of doing, when it declared that King James had *forfeited* his crown. A youthful imagination, inspired with a warm spirit of liberty, is apt to prefer this boldness of *Scotland*! A more experienced mind, inspired with an equal love of liberty, but tempered by an attention to the nature of laws, observes with pleasure the judgment of *England*!

So much then for the inviolability of Sovereign Powers, in order the better to demonstrate the *possibility* of such a privilege in the abstract. In the future course of our subject, we shall have occasion to observe, how this account of the nature of inviolability *in general*, will apply itself to that part of our enquiries which gave rise to it. For having advanced so far as to discover, that there actually are cases in which an exemption from trial is necessary, and even unavoidable; and having discussed the possibility, or impossibility of *legally* getting rid of this exemption,

tion, and, moreover, what we are actually to think of the mode by which we may remove its pressure; we shall have the less difficulty in examining the nature and extent of that sacredness of person, which has been claimed and enjoyed by *Ambassadors*.

This exemption from trial however, in a public Minister, does not go so far as that which we have just been discussing in the case of Sovereigns. For the latter is absolute, general, and entire; the former is confined solely to exemption *from the jurisdiction of those tribunals which distribute justice to the country where he resides*. It is never pretended by the law of his privileges, that an Ambassador shall not be tried *at all*; but merely that he shall not be tried by those who receive him. Accordingly, it is held that he should be stripped of his functions, and sent back to his Master with a request for his punishment; and if his Master refuse, he makes the act his own, and the nations are then in a state of hostility together. Thus, if an Ambassador even commit *murder*, or stir up rebellion at the Court where he resides, the Court shall not take farther cognizance thereof, than to

prevent greater mischief; and, sending him from the country, shall leave it to his own to do justice.

This is founded on two reasons: First, because the necessity for Embassies, demands the absolute freedom of the Ambassador, in *every case* that can arise. Secondly, because the Ambassador appears not in his own person, but represents that of another, and is allowed to be held to do so by the compact which receives him as Ambassador. (b)

That his freedom should be absolute, even in the case of the most atrocious delinquency, will appear to any one who considers the nature of his functions, which would otherwise, not only be most dangerous to himself, but perpetually run the hazard of being annihilated. An Ambassador is, for the most part, constituted for the protection of the interests of his nation, in the very bosom of another nation, whose interests may be opposite. He is the mouth-piece of his own Go-

(b) Grot. D. J. B. et P. 2. 18. 4, 5. Huberus De J. Civil. L. 3. c. 12. 22, 24.

vernment, and the possessor of its secrets ; he is also the representative of his Master, to all the subjects of his own nation who may happen to be in the country, and who may have extensive property to protect, and distant interests to secure. It is hardly possible to conceive a situation of greater burthen and magnitude, or requiring greater real power, and yet so little supported, or rather so entirely destitute of defence, if he was not surrounded by bulwarks far stronger than those which are the defence of common persons. If he trusted only to his own innocence for exemption from trouble, he would trust solely to the sense of justice of those, under whose absolute power he was daily living ; and who, besides, would have every temptation that can be urged to the human passions, to violate his security.—For as the power which could punish him if guilty, would of course have the right to accuse him, *whether guilty or not*, cases might be perpetually happening, or might be continually feigned, in which he might be brought to trial, although he were innocent. And thus, the business of the Embassy might be stopped, the person of the

Minister humbled, his papers seized and inspected, and his whole secrets discovered, under pretence of a formal process, which in the end, it might prove, he had never deserved. But being thus, not in the situation of an ordinary person who trusts to his little consequence for an escape from the jealousy of the State, he has a natural right, it should seem, to greater protection. In all schemes of penal law, the ease with which a crime may be committed, and the greater temptations which are held out for such commission, are deemed fair reasons for a greater severity of punishment to prevent it. But as a nation cannot be punished itself, by any judicial process, and the Ambassador is therefore deprived of this support to his security, the world has done wisely, in cutting off all possibility of temptation at all, by exempting him from all jurisdiction whatsoever in the country where he resides, even at the hazard of allowing him *for a short time* to do wrong. Nor is it of consequence to consider whether this wrong be against the municipal and positive laws of the State, (as the crime of coining,) or against the general law of nature and nations, (as

murder). (c) I say *for a short time*, because, as it is allowed that a Minister who has really offended the laws, may be sent home by force, and his punishment even demanded, it is not probable that a violent man who had once offended, would ever be allowed to repeat the offence. And thus even in the event of a crime, this is one of those cases, in which the interest of the world is more benefited by its exemption from punishment, than it is hurt by suffering the law to be broken with impunity. It is suffering an evil, but it is suffering it for the sake of a greater good. (d)

That this is the Law of Nations as founded upon reason, is the opinion of *Grotius*, who seems to have been the first who started it with precision; of *Wicquefort*; (e) of *Zouch*;

(c) Unde sequitur; quod non modo in mere civilibus, ut aliqui volunt, sed ne quidem in his quæ sunt *juris naturæ et Gentium* delictis, pænæ sint subjecti. Huber. De J. Civ. 3. 12. 19.

(d) Adde quod securitas Legatorum, utilitati quæ ex pæna est preponderat. Grot. D. J. B. et P. 2. 18. 4. 5.

(e) De l'Ambassad, *passim*, *Wicquefort* composed his work expressly to prove the point, smarting under the

Zouch; (*f*) of *Huber*; (*g*) of *Bynkershoek*; (*h*) and of *Vattel*; (*i*) names which stand highest among the Jurists of the world. It was, however, warmly contested in *Europe*, and for a long time divided the Civilians, who, as we shall have occasion to point out in another Chapter, had not yet fallen upon the true method of coming at the Law of Nations. In truth they had not yet shaken off the trammels of the Roman law, and numberless difficulties were therefore started from the *Digest*, concerning the word *Legatus*, the only one known in Latin for Ambassador. For they did not recollect immediately, that it admitted of two interpretations, namely, an Ambassador from one independent State to another; and a *Deputy* from a dependant province to the Court of Rome; and hence the source of much of the contest concerning this opinion. By degrees, however, this punishment, which being Minister of Lunenburg at the Hague, he had received from the States, in whose service he also was, and whose secrets he had betrayed.

(*f*) *Solutio Quæst. De Leg. del. Jud. comp.*

(*g*) *De Jur. Civ. 3. 12.*

(*h*) *De Foro Legatorum. c. 17, 18, 19.*

(*i*) *L. 2. S. 94, 5, 6.*

error

error was discovered, the practice of nations was appealed to, and the Jurists gradually came to adopt it as found. (k)

Concerning this practice, as it is to be found in the cases upon the records of Europe, we now proceed to enquire. These, as it may be imagined upon almost any point where so much is left to discretion, and where a common court of judicature is wholly unknown, will naturally vary, or at least be capable of different interpretations. More particularly, as we have seen what were the opinions of the English Civilians in the middle of the sixteenth century, it may be supposed that the earlier cases will militate against the doctrine just recited. It happens however, not only that the proceedings upon the point, have been uniform since the time of *Grotius*, but I have not been able to find any case full enough in its circumstances, to be of sufficient authority, in which an offending Ambassador *has been regularly tried by the laws of the land*. *Bynkershoek*, who made this enquiry with

(k) De Legatis summarum Potestatum varie nostro tempore disceptatum et observatum. Prævaluit tandem sententia *Grotii*. Hub, Prælect. ap. Bynk. De For. Leg.

great industry at the beginning of this century, could only discover four instances in which Ambassadors had ever been brought to *punishment* at all ; and of these four, three were attended with additional circumstances, which took them out of the case. The fourth stands alone, nor from his manner of relating it, can we arrive at any of the facts ; he observing simply, " In Lusitania " Legatus quod adulterium comississet, ultimo " supplicio affectus." (1) We are therefore left in the dark, whether his death was the consequence of *open violence*, or fair trial. Many Ambassadors indeed have been threatened, many chastised, many banished, many have suffered violence ; but every thing they have suffered has been more by way of *prevention* and self defence, than regular punishment ; and none, that I have found, have been brought to open trial.

In the year 1584, not long after the opinions delivered in the Bishop of Ross's case, *Mendoza*, the Spanish Ambassador in England, having conspired to introduce foreign troops,

(1) De For, Leg. c. 17,

and dethrone the Queen, (m) it was a matter of difficulty how he should be punished. Had the Council thought the opinions of *Lewis Dale*, and the other Civilians good law, they probably would have acted upon them; for here was a case, precisely similar to that on which they had been consulted. They however took the opinions of the celebrated *Albericus Gentilis*, then in England, and of *Hottoman* in France, who both asserted that an Ambassador, *though a conspirator*, could not be put to death, but should be referred to his principal for punishment; or, (according to Hottoman) sent away by force out of the country. (n) In consequence of this *Mendoza* was simply ordered to depart the realm, and a Commissioner sent to *Spain* to prefer a complaint against him. (o)

Three years afterwards there was a conspiracy not only to dethrone the Queen, but to put her to death. The circumstances are these. L'Aubespine, the French Ambassador, being wholly devoted to the Queen of Scots,

(m) Camden, 296.

(n) Zouch. Solut. Quæst. 130.

(o) Camd. ub. sup.

endeavoured, to procure the assassination of ELIZABETH. For this purpose he tampered both by himself, and Secretary, with *William Stafford*, a man about the Court. Stafford refused to be concerned in it himself, but recommended *Moody*, a noted ruffian, then in Newgate, to be the instrument. With this man conferences were held by *Trappy* and *Cordalion*, both of them Secretaries to L'Aubespine. It was proposed to take off the Queen by poison, or to blow her up by firing twenty pounds weight of gunpowder under her bed. Neither method was approved by *Trappy*, "who wished for such another resolute fellow as had assassinated the Prince of Orange." In this state of the affair, *Stafford* revealed the plot. *Trappy* was arrested, and both he and *Stafford* confessed the whole before the Council. The Ambassador was sent for, but said "he would not hear any accusation to the prejudice of the privileges of Ambassadors." When *Stafford* was brought in, however, he assented to his knowledge of the matter, but said it was first propounded by him. *Stafford*, on the contrary, protested on his salvation that the first he knew of it was from the Ambassador. Lord *Burleigh* then reproached him

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him with the design ; yet never thought of *trying* him. All that we can find is, that he bad him beware how he committed Treason any more ; that the Queen would not by punishing a bad Ambassador, prejudice the good ; and that he was not acquitted from the guilt of the offence, though he escaped the punishment. (*p*) In 1601, the Comte de *Rockpot*, being Ambassador from France to Spain, his servants had a quarrel with some Spaniards at *Valladolid*, in which two of the latter were slain, of whom also one was a priest. The Magistrates seized the criminals with a view to *try* them, but upon *Rockpot's* complaint, and retiring from Spain, they were delivered into the hands of the Pope, at Rome, and finally released. (*q*)—HENRY IV. of France, having given a promise of marriage to Mademoiselle *D'Entragues*, and afterwards marrying Mary de Medecis ; the Spanish Ambassador *De Zuniga*, after the birth of the Dauphin, plotted with the father of the lady, and the Comte D'Auvergne, to carry her off to Spain, together with her son by HENRY,

(*p*) Camden ad an. 1587.

(*q*) Winwood's Memorials, i. 342. Mem. de Sully, 2. 73. Qrto.

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whom they meant to consider as the real Dauphin. The plot was discovered; D'Enragues and D'Auvergne were tried and imprisoned; but though the crime of the Ambassador was manifest, the King would not suffer him to be punished. (r)—The Spaniards had before this, in time of full peace, plotted with *Merargues*, Syndic of Provence, for the surprise of the city of *Marseilles*. The affair was carried on by *Merargues* and *Bruneau*, Secretary of the Spanish Embassy, under whose garters a paper containing the particulars of the treason was discovered. *Merargues* was tried and put to death, but the Spanish Ambassador demanded *Bruneau* as his Secretary, and under the protection of the Law of Nations; and the King, HENRY IV. *having consulted the most able Jurists at Paris*, delivered him up with an order for him to depart the kingdom. (s)—In 1603 the *Duc de Sully*, then Marquis de *Rosny*, being Ambassador at London, one of his retinue quarrelled at a brothel with some English, one of whom he killed. The populace rose, but were quieted by the Lord Mayor, who demanded justice. Justice however was not done by

(r) Wicquef. i. 392.

(s) Ib.

the Magistrate, but by *Sully* himself; who assembled a council of *Frenchmen*, condemned the man to death, and not till then, delivered him to the civil power. JAMES I. pardoned him, but no attempt was made to *try* him by the English law, and Sully delivered him up solely for execution. (t)—In 1618, Alphonso de la Cueva, Marquis de *Bedmar*, Ambassador of Spain, contrived the famous conspiracy against *Venice*. It is needless to go into the particulars of that celebrated plot. Suffice it to say, that the town was to be set on fire, the citizens and nobles murdered, and the Government overturned. The facts were proved against *Bedmar*; arms and fireworks were found in his house, and letters concerning their application. But though the populace endeavoured to destroy him, the senate protected him from violence, and contented themselves with sending him to *Milan*, and requesting the King of Spain to recal him. (u)—In the reign of King JAMES I. of England,

(t) Mem. de Sull. 2. 191, 192. Another, and a very curious question, arose out of this case; the French contending, that, although JAMES might remit the execution of the man in *England*, yet, being a Frenchman, and judged by his own tribunal, he could not grant him a pardon.

(u) St. Real. Conjur. des Esp. Contr. Ven.

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the Spanish Ambassadors *Inoyosa* and *Colonna*, endeavoured to breed a disturbance in the country, by informing the King that the Duke of *Buckingham* meant to imprison him by means of the Parliament, and to transfer the regal authority to the Prince of *Wales*. Both the Court and the Parliament deemed this a scandalous libel, but knew not how to proceed with the Ambassadors.—*Sir Robert Cotton*, who was consulted, wrote a tract called “A Relation of the Proceedings against Ambassadors who had miscarried themselves,” in which he asserts “that an Ambassador, representing the person of a Sovereign Prince, he is by the Law of Nations exempt from Regale Tryale; that all actions of one so qualified, *are made the act of his Master*, until he disavow them; and that the injuries of one absolute Prince to another, is *Factum Hostilitatis*, not *Treason*, so much doth public conveniency prevail against a particular mischief:” He then states various examples of Ambassadors who have had violence put upon them *by way of prevention*, rather than *punishment*; none of them amounting even to a design to try them; and then recommends that some of the chief Secretaries should wait upon the Ambassador of Spain, and *by way*
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of advice, desire him to keep his house, for fear of the people; that the Prince of *Wales* and Duke of *Buckingham* should complain of the calumny in Parliament; that *both Houses* should, in consequence, wait upon the Ambassador, to request to know the authors of it, in order to *try* them *legally* in Parliament; that if he refused, he should then be confined to his house, and a formal complaint sent against him to the King of Spain, *requiring such justice to be done upon him, as by the leagues of amity and the Law of Nations is usual*: If the King refused, it would then be “*Transactio Criminis* upon himself, and an abso-
lution of all amity, amounting to no less than war denounced.” (w) This was the opinion of the English Court, complaint was made to the King of Spain, and the Ambassador allowed to depart, but without the usual presents. (x)—In 1657, a domestic of Monsieur de *Tbou*, Ambassador of France at the *Hague*, endeavouring to commit violence upon a woman in the streets, he was detected by the patrol and carried to the guard house, *in order to be delivered to the civil tribunal*. He

(w) Cotton's Remains.

(x) Wicquef. i. 393.

was, however, demanded by *De Thou*, of the Deputies of Holland, *as a privileged person*, and restored by the municipal power to receive justice from the hands of his Master. (y) —In 1666, a hunting party being made by the Court at Vienna, a gentleman in the suite of the Spanish Ambassador, endeavoured to press into a place reserved for the nobility, and was stopped by the Count de Kevenhuller, who being treated with impertinence, gave him several strokes with a cane. The affront produced a serious affray some days afterwards, the Ambassador's train in revenge setting upon the Count in his coach, firing into it with pistols, and piercing it with swords, by which the coachman was wounded, and the Count scarce able to save himself. The guard arriving, the Spaniards retreated to the Hotel de Ville, where they defended themselves till two were disabled, and then yielded. The Ambassador flew to support his domestics, and *endeavoured to force the Hotel de Ville* where they were imprisoned, but failing, went to Court to demand reparation, which he did in such insulting terms, that he was himself

(y) Aitzem. L. 27. ap. Bynkersh. De For Leg. c. 20.

put into confinement. In the end, instead of the punishment of the Spaniards, who had been guilty of the greatest outrage, a compromise was made. The Ambassador made excuses for his own passion towards the Emperor, for which he and his domestics were released, and the Count de Kevenhuller declared upon his honour that he did not know that the person whom he originally struck had belonged to the Embassy. (z)—In 1654, M. De Bals, Minister from France to Cromwell, was accused of a conspiracy against his life. The Council endeavoured to make him undergo examination, but he refused, saying, “that although he would communicate with Cromwell personally, and prove to him that he was not privy to the design; yet he would not submit to interrogatories before a Judge; for being a public Minister, he would by so doing offend against the dignity of his Master, to whom alone he was accountable for his actions.” The Council retired to consult what was to be done with him, and he persisting in his refusal to answer, they contented themselves with ordering him to depart

(z) Mem. Touch. les. Ambass. 237.

the country in four and twenty hours. (a)—In the reign of CHARLES II. the *Spanish* Ambassador, enraged at the approaching match with *Portugal*, endeavoured to raise a sedition in the army, and the people, by scattering inflammatory papers among them; at which the King was so incensed, that he ordered him to depart the realm, and told him that he would send a complaint to his Master, *from whom he would expect that justice should be done him.* (b)—Even the Turks have sometimes acknowledged the doctrine we are discussing.—In 1646, the Ambassador of England at *Constantinople*, was summoned by the merchants before the *Divan* to answer some complaints. The Ambassador representing his privilege, the Grand Vizir said, “*he was aware that it was a thing unheard of to summon an Ambassador before the Divan, which would destroy the rights of Ambassadors, and the Law of Nations.*” It is true, he was afterwards arrested and sent home, but that being solely owing to the revolution in England, and the arrival of a new Minister, has nothing to do with the point. (c)

(a) Thurloe's State Pap. 2. 351, 437. Wicquef. i. 396.

(b) Lord Clarendon's Life, 90. (c) Wicquef. i. 398.

And thus we have quoted a variety of examples which are in point to prove the principles we have adopted. They contain a number of *positive*, and some of them very serious breaches of the law of the country where the Ambassadors have resided, yet shew the fullest exemption from the power of the civil tribunals. Some authors, indeed, have allowed that they are exempt from answering for breaches of the municipal law, which they call "*Malum prohibitum*;" but insist that nothing can prevent them from being responsible for crimes against the law of nations, which are *mala per se*. Thus, says Lord Coke,

" If a foreign Ambassador, being prorex,
 " committeth here, any crime, which is *contra*
 " *jus gentium*, as *treason, felony, adultery*, or
 " any other crime, which is against the Law
 " of Nations, *he loseth the privilege and dignity*
 " *of an Ambassador*, as unworthy of so high a
 " place; and may be punished here, as any
 " other private alien, *and not to be remanded*
 " *to his Sovereigne but of courtesie*. And so of
 " contracts, that be good, *jure gentium*; he
 " must answer here. But if any thing be *ma-*
 " *lum prohibitum*, by an act of Parliament, pri-
 " vate law, or custom of this Realm, which

" is not malum in se, *jure gentium*, nor contra
 " *jus gentium*; an Ambassador residing here
 " shall not be bound by any of them." (d)

This opinion, of *Coke*, is quoted, and reasoned upon as clear law, many years afterwards, when more accurate doctrines had been broached, by *Molloy*, treating of the Law of Nations; (e) and by *Comyns* treating of the Law of England, who gives it full place in his digest. (f) With submission, however, to my Lord *Coke*, it appears to me that he has not in these sentiments taken a very clear view of the subject. Treason, at least, which is a positive crime against the Municipal Constitutions of a State, and modified by the law of the land, cannot well be called a crime against the Law of Nations. And hence the opinion of *Hale*, as far as treason by the law of England is concerned, is in direct opposition to that of *Coke* and *Comyns*; he contending, that if an Ambassador even stab or poison the King, and death does not ensue (than which nothing can be clearer proof of treason, if it were the

(d) 4th Instit. 153. (e) De Jur. Marit. 139.

(f) Comyns Dig. Art. Ambass.

case of a subject) though he agrees he may be punished, yet it shall be only as an enemy, not as a subject. (g) *Hale*, indeed, affirms with them, that by the law of England, he may be tried for *other* crimes, which are also against the Law of Nations, such as *murder*; and that opinion we shall presently have occasion to examine. In the mean time we observe, that the authorities of the Civilians quoted, whether they relate to the law of England, or of other countries, go to the most complete and general exemption, let what will be the crime committed; and the cases cited to support those authorities, contain strong instances of *treason*, *felony*, and even *murder* itself.

There is, however, one case on the records of Europe, which seems to militate against the doctrine in question, and which we should be unjust to our subject if we did not examine. It is that of *Don Pantaleon Sa*, brother to the *Portuguese* Ambassador in England, in the time of Cromwell, who was indicted, tried, found guilty, and executed for an atrocious murder.

(g). Hales Pl. of the Cr. 1. 97:

Of this case I shall first relate the facts, and afterwards the opinions upon it which many lawyers and Civilians have entertained. On the first of November, 1653, *Sa*, and two others of the Embassy, talking of some matters in the new Exchange, were set right as to a fact by one Colonel *Gerhard*. One of them gave him the lye, and a scuffle ensued, in which *Gerhard* was severely wounded, and would have been killed, had it not been for another gentleman, who drew in his defence. The Portuguese resolved upon revenge, and a more atrocious or deliberate scheme could not be devised. They came on the next night, to the number of fifty, to the new Exchange, armed with swords, pistols, and coats of mail and attended by two or three coaches with ammunition, consisting of hand grenadoes, bottles, and little barrels of powder, and bullets. Their scheme seems to have been, to have murdered every one promiscuously; being said to have put every one to flight, and to have pistoled, cut, and wounded many! In this situation, a Mr. Greenaway coming to see what was the matter, they shot him through the head, and wounded Colonel Mayo, and Messrs. Howard and Carter, who were

were passing by. It was not till this time that the horse-guards came and took several of them to prison, the rest retiring home *firing at the guards*. The Ambassador was afterwards required to deliver up others of the delinquents, which he complied with, and his brother was among them. He interceded for his brother, but *Cromwell* resolved, if he could, to try him by the Law of the Land. (*b*) He, therefore, consulted the most eminent of the professors of the civil law, to settle *how* such a barbarous murder might be punished. But these, disagreeing among themselves, he left the decision of the affair to a court of delegates, consisting of the Chief Justice, and two other Judges, three Noblemen, and three Doctors of the Civil Law. Before these, *Sa* was examined. At first he was supposed to be a colleague in the Embassy, and he vaunted himself that he was the King's Ambassador, "*and subject to the jurisdiction of no one else*." He was made, however, to produce his credentials, by which, all that could be proved was, that the King *intended* in a little time to recal his brother, and to give him a commission to ma-

(*b*) This account is taken from Lord Somers Tracts, 10. 65. et inf.

nage his affairs in England. This being judged insufficient to prove him an Ambassador, he was, without any farther regard to the privilege of that character, ordered, as well as all the rest, to plead to the indictment.

Such is the accurate statement of the affair till it came to a Jury, as it appears from the account of Zouch, a Civilian of eminence, and himself a delegate in the cause; (i) and I have been thus particular in these preliminary steps of it, in order the better to ascertain what was the real opinion of the English lawyers upon the main point in question. For I think it is evident, from this account of the matter, (and one of more authority can hardly be met with), that had *Sa* been actually *Ambassador*, instead of forming part of the *suite*, the proceedings against him would have been the same with those in the cases cited above. All, therefore, that can fairly be drawn from *this* precedent, *as to the deci-*

(i) Vide Zouch, Solut. Questionis. de Leg. delinq. Jud. Compet. in præf. *Sa* was tried by a Jury under a Commission of Oyer and Terminer. Hale Pl. of the Cr. i. 99.

son of the then existing law of England is, that the *suite* of an Ambassador, if they committed murder, were liable to be tried for it by the Courts of the Country. *Zouch* asserts expressly, that his own opinion upon the main question, founded upon *Grotius*, and the *best authors* agreed with them as to the exemption of Ambassadors themselves; and it should appear, from his *Solutio Questionis*, that if *Sa* could have proved that he was an actual *Ambassador*, his plea before the delegates would have been allowed. In the course of his work also, he examines the Bishop of *Ross's* case, and the opinions of the English Civilians upon it, so often cited, and blames those opinions in the most unequivocal terms. It is true, it ought to be observed, that he differs from *Grotius* in his opinion, on the immunity of the *suite*, but as that point is not now before us, I shall not, by endeavouring to settle it, interrupt the course of the present reasoning,

An attention to the particulars of this nice case, as thus recorded, will probably lead us to review the opinions upon it, entertained by men of the very first authority in the law of
England,

England, with considerable caution; though it is not but with extreme diffidence that we venture at any thing like an examination of the sentiments of *Hale* and *Foster*. Nevertheless, supported as we are by such a number of clear cases demonstrative of the Law of Nations on the other side; and more particularly by this account of the circumstances of *Sa's* case, the only one on which *Hale* has relied; we cannot help suspending our judgment, notwithstanding the opinions of those great men. Lord *Hale*, in that part of his work which treats of the proceedings authorized by the law of England against Ambassadors, rests the whole upon cases. Upon these cases it is, that he relies for authority in saying that an Ambassador committing treason can only be treated as an enemy, and not tried as a subject. Upon this one case (of *SA*) also it is, that he founds his position, "That if the Ambassador, or his associates, commit any other capital offence, as *rape*, *murder*, or *theft*, they may be proceeded against by *indictment* in the ordinary course of justice, as other aliens committing like offences."(*k*)

(*k*) Pleas of the Crown. 1. 99.

But

But if we are right in what we have shewn to be the true extent of the precedent of SA; though it may apply to the *associates* of an Ambassador, it cannot apply to the Ambassador himself. For authority to try him for *rape*, or *theft*, *Hale* quotes no case at all.

Foster, in one sense, goes not so far, in another goes farther than *Hale*, in the deduction of his opinion. He goes not so far, inasmuch as he does not quote a particular case as the ground of an opinion, which it will not warrant in all its extent. He goes farther, in resting his sentiments upon *general* reasoning, drawn from the abstract subject, which never can be precise or fixed enough, if destitute of cases, to say what is and what is not the municipal law. "But for murder," says he, "and other offences of great enormity, which are against the light of nature, and the fundamental laws of all society, the persons mentioned in this section, are certainly liable to answer in the ordinary course of Justice, as other persons offending in the like manner are. For though they may be thought not to owe allegiance to the Sovereign, and so to be incapable of com-
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“ mitting *high-treason*, yet they are to be considered as members of society, and consequently bound by that eternal universal law, by which all civil societies are united and kept together.” (1)

This reasoning, if considered merely in the abstract, and applied to a subject which was, *Res Integra*, is excellent. As applied to municipal constitutions, or even to the *Law of Nations*, as far as custom is concerned, it can prove nothing. For though no one can deny its soundness as a general rule, yet he shews no cause why exceptions may not be made to it, even for the purpose, namely, the benefit of society, which is the very foundation of its soundness. That there may be cases, in which persons offending against the light of nature, may, and ought to be suffered to be exempt from trial, we have already endeavoured to shew in treating of the inviolability of *Sovereigns*; but this reasoning would apply equally well, if it was supposed to be universal, against the immunity of *Sovereigns* themselves; “ for they also are members of society, and consequently bound by that eter-

(1) Foster's Crown Law, 188.

nal universal law by which all civil societies are united and kept together." If therefore it be said, without any statute quoted, or any case recited, that an Ambassador may be tried in this country for murder, solely because it is a crime against the *light of nature*, and the law of the land punishes murder in other foreigners; with equal truth it ought to be said, that the Sovereign may be tried for murder, which he cannot be. From any thing therefore, which *Foster* has laid down concerning this point, there is nothing in it which appears so universally binding, as to preclude *all exception*; and that the case of an Ambassador committing murder *was not an exception*, should have been proved by cases, which *Foster* has not endeavoured to shew. Whereas, there are against him both reason and cases, which we have shewn, and we may perhaps therefore be not far wrong in considering these tenets, *to be not sufficiently made out* as forming part of the law of England. (m)

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(m) Blackstone, mentioning this doctrine of *Foster*, observes that *formerly* it was upheld both by our common lawyers and civilians. He, however, quotes only

The great difficulty seems to be, in being able to reconcile how it can be possible for a man, guilty of so atrocious a crime as murder, to be exempt from trial. This, however, is not actually the question. It is, simply, why he should be exempt from trial *in the country where he commits the murder*. For it is so far from being pretended that he should be *secure* from punishment, that it is insisted he should be sent home to be tried by his own laws; and in cases of crimes really against the light of nature, they would naturally provide for his trial, as well as those of the country where he committed the crime. Probably it may be urged, that his own master could have no cognizance of the affair, the murder having been committed *out of his jurisdiction*. In answer to this we may observe, first, that this will depend upon the particular constitution of

only common lawyers—Bulstrode, Rolle, Coke and Foster. The only civilians were probably the five mentioned by Camden in the case of the Bishop of *Ross*, whose authority as we have seen was impugned by *Zouch* in the next century. At any rate, Blackstone considers it as *Old Law*, and concludes that whatever may *formerly* have been the practice, this country, as well as the rest of Europe, seem, for a century past, to have pursued the opinion of *Grotius*. Comment. i. 253, 254.

his own country ; secondly, that the Sovereign *having jurisdiction* in the country where the crime was perpetrated, waves his right to try him, in favour of his own Sovereign, and even demands that trial as a matter of justice ; thirdly, that whatever may be the constitution of his own country, with respect to its jurisdiction over common subjects abroad, yet Ambassadors never lose their subjection to their own courts of justice at home, during their temporary absence ; the whole of our reasoning being founded on this very circumstance, that they are allowed to be considered as *still* enjoying the protection of their own community, though dwelling within the bosom of another. And hence the children of an Ambassador, born during the embassy abroad, are allowed all the same rights which birth place could give them at home ; and an Ambassador himself is supposed to enter upon all advantages that may have occurred to him while absent, without the intervention of the right of postliminium. It is therefore, by no means the intention of the law of nations, to confer a perfect indemnity upon an Ambassador committing a crime which is *malum per se* ; but only to exempt him, *pro tempore*, from trial.

And thus we have endeavoured to examine this difficult subject, and to settle in particular, all the various interpretations which the case of *Don Pantaleon Sa*, is fairly capable of receiving. The result is, that however it may militate against the exemption from trial in the *suite*; yet it proves nothing, either one way or the other, if fairly attended to, with respect to the Ambassador himself.

Of all the other cases in which violent hands have been laid upon an Ambassador, (and there are many of them scattered up and down the various histories,) not one amounts to a regular trial; but they are either the consequence of sheer, undeserved violence, or punishments *via hostilitatis*, for attempts against the safety of the State. (*n*)

Much of what has been said, will discover the true way, in which the reason and custom of our ancestors have thought it right to proceed against offending Ambassadors; but as there may really be cases, in which there is not actually time to prevent the explosion of

(*n*) Vide Bynkerfh. De For. Leg. c. 18. ad. init.

mischiefs that may have been contrived, unless the Government offended, takes upon itself to act, it has always been held lawful, or rather the necessity of the times has excused it in those cases, to interfere in a violent and forcible manner. Thus, in some cases, Ambassadors have been confined to their houses; or beset with guards; or forcibly sent away; and, where the necessity is very urgent, they may even be put to death. But this has always been by way of *self defence*, not of trial or punishment; it has been, as it were, in open war, and as a declared enemy, authorised as such by the aggression of the Ambassador; never as a power claiming a regular jurisdiction to bring him to trial. (o) It is exactly the same sort of case which we before contemplated, when we supposed an hereditary Sovereign, (who was therefore for ever inviolable as to law, under every crime he might commit,) to become a *monster*, and trample upon all the rights of the subject; in

(o) Sane occidi poterit, non per modum pænæ, sed per modum naturalis defensionis. Grot. D. J. B. et P. 2. 18. 4. 7. So also, Huber. De Jur. Civ. 3. 12. 32, 33. Quin etiam, si ipso facto vim inferant, vi illis resistitur, et si cadant, jure cæsi intelliguntur.

which case we held it allowable, (though allowable solely by the law of force, not of the constitution,) for the subject to destroy the tyrant if he could, without pretending to seize or to judge him, *by any juridical process*. It may, indeed, be compared to the case of a private man, who, in a well regulated country, being set upon by a thief or a murderer, it is allowable for him to resist, and even to kill him; but if he overpower him, he never can bring him to trial before himself, but must deliver him to the tribunals of the country.

Of these various manners of proceeding, there are many examples, some of which may be found in the cases already cited to prove the exemption from the municipal jurisdiction, and most of them are set forth at large in the writers we have so often cited. I shall therefore but mention one other, of modern date, and which happened in our own country. On the 29th of January, 1717, the Government of England having certain information of a conspiracy to invade the country and dethrone the **King**, contrived by *Gyllenburg*, the *Ambassador of Sweden*, at that time at peace with

with Great Britain ; they ordered the arrest of that minister, which was accordingly effected. General *Wade* and Colonel *Blakeney* to whom the charge was entrusted, found him making up dispatches, which they told him they had orders to seize ; and they even insisted upon searching his cabinet, which, upon the refusal of his Lady to deliver the keys, they actually broke open. *Gyllenburg* complained of these proceedings, as a direct breach of the Law of Nations, and some of the Foreign Ministers at the Court of London expressed themselves to the same effect ; upon which the Secretaries of State, *Methuen*, and *Stanhope*, wrote circular letters to them, to assign reasons for the arrest, which satisfied them all except *Montleone*, the Spanish Ambassador, who in his answer observed, that he was sorry *no other way* could be fallen upon for preserving the peace of the kingdom, than that of the arrest of a public Minister, and the seizure of his papers, which are the repositories of his secrets, two facts which seemed sensibly to wound the Law of Nations. (p)

(p) Tindal. Contin. of Rap. The proceedings against *Gyllenburg* are quoted by *Bynkershoek* to prove his opinion. De For, Leg. c. 18.

The observation, however, answers itself; since the confession that there was *no other way*, proves that this extremity was the simple consequence of those universal laws, which ever will and must overcome all other; I mean legitimate necessity, and self defence.

Upon self defence, however, a very grand question arises, namely, what shall constitute that sort of necessity which may authorise us to put a public Minister to death? Or, more particularly, how far in punishment we may proceed, according to the given circumstances of the case? This question has formerly called forth very serious discussions from the Jurists, and some have gone so far as to say that an Ambassador may be put to death, because while alive, even though banished, it may be impossible to crush a conspiracy which he may have left behind him. (g) I confess, however, that I think it not only difficult to treat of this supposed case; but that all discussion whatsoever about a matter so vague, is dangerous and chimerical. It is to destroy the whole fabric concerning the immunity

(g) Barbeyrac, Not. x. ad Bynk. For. Leg. c. 24.

of Ambassadors which has been raised ; for although that immunity is asserted in the most general terms, and in all cases except that of necessity, (which can never be foreseen !) yet we here see a set of predicaments, attempted to be laid down *before hand*, in which the immunity shall not have place. Ever to say *before hand*, what shall constitute the exact *particulars* of a case of necessity, is almost impossible : such particulars are omitted out of every code of law, from the very impossibility of foreseeing them ; for could they be foreseen, they would no longer form the case of necessity, but be provided against by the law. On the subject before us, there might be furnished a long list of varying opinions. One holds, that an Ambassador is to be punished for crimes actually *committed*, but not for those which are merely *projected*. Another, that although he is privileged, yet if he commit guilt, his privilege may be taken from him, and he may *then* be punished. A sophism which needs no comment. A third, that he is inviolable for crimes which are merely immoral, but not for crimes against the state ; that in the one case he must be sent back to his master, in the other retained for punishment,

ment, *provided there is reason to expect that his master will not inflict it.* A fourth, that he may be punished, *provided there is no great necessity to cultivate the friendship of his Sovereign.* (r) All this, it is obvious, is too vague to come under any thing like one certain rule or measure, and it would be vain to consider it as any part of law. Much better therefore will it be to content ourselves with the opinion of Van Bynkerhoek upon the subject, that the only case in which we may fairly kill an Ambassador is when we really cannot save ourselves without it—a case which he farther illustrates by supposing this Minister himself to be armed against us and to die in open tumult. (s)

So much then for the inviolability of Ambassadors themselves. The exemption of their *suite*, is a question not so generally decided. It is, however, to be found fully laid down in *Grotius*, who upholds it in express terms; (t)

(r) Vide Bynkersh. De For. Leg. c. 24.

(s) Sed fere semper res aliter salva esse potest, si non manu agat legatus, et tumultuaria caede succumbat. De. For. Leg. c. 24.

(t) D. J. B. et P. 2. 18. 7.

is followed by *Wicquefort*, (u) *Huber*, (v) *Bynkershoek*, (w) and *Vattel*, (x) and is supported by numerous cases. Of those that have been already cited, the cases of the domestics of *Rochpot*, of *Sully*, of *De Thou*, and of the Spanish Ambassador at Vienna, are exactly in point; and hence therefore, when at the Congress at *Nimeguen*, in the last century, the assemblage of so many privileged persons as composed the trains of the Ambassadors might have been detrimental to the peace of the city, it was agreed by the Ambassadors themselves, that they should wave their right to protect their servants, and the magistracy of the town was allowed, *by consent*, to do justice among them. (y) At the same time the law of England seems to have made an exception to it, in criminal matters, in the case of *Sa*, and the opinions of *Hale*; and I find one other strong exception to it, in a remarkable transaction in Spain, in the sixteenth century.

A criminal at *Madrid* in the time of Philip II. having escaped from Justice, took re-

(u) De l'Ambas.

(v) De Jur. Civ. 3. 12. 28. (w) De For. Leg. c. 20.

(x) L. 4. S. 120. (y) Temple's Mem. 1672. 1679.

fuge in the house of the Venetian Ambassador, and was pursued by an officer, who was told from a window by the Ambassador himself to enter the house, but who was immediately set upon, ill-treated and driven away by the gentlemen and servants of the embassy. The Officer complained to the President of *Castile*, who took information of the whole affair, and ordered the Provosts to send and seize the delinquents. Hearing that they were to be resisted, the Provosts, instead of sending, went themselves, and upon entering, found the Ambassador armed with sword and buckler, and the whole suite prepared to oppose them. They nevertheless *without violence*, contrived to amuse the person of the Ambassador, while their officers seized several delinquents, among whom was *Badoaro* one of his relations. These were tried by the tribunals of the country. *Badoaro* was condemned to be beheaded; several valets to be hanged; and others to be flogged; and the king wrote to the Republic of Venice, and to all other Christian Powers, acquainting them that his will and desire was, *that when his Ambassadors committed any crimes unworthy of their station, they should be stripped of their privileges and* judge.

judged by the laws of the kingdom where they resided. (z)

This case is as strong as it is possible to be against the positions in question. It is to be found in *Anthony Vera's* Parfait Ambassadeur, and *Wicquefort* endeavours to shake its authority by saying he never met with it in any other history. It is, however, also to be found in *Wotton's* account of Christendom, (a) and the Legatus of *Frederick Marflaer*, (b) De Callieres seems content in thinking that justice was done, and yet *the dignity of an Ambassador preserved*. (c) But according to all the foregoing reasoning, whatever may have become of the Ambassador himself, it must be confessed that the whole law concerning the inviolability of Embassies as we have reviewed it, was absolutely destroyed. All then that we can fairly say upon this, and the case of *Sa*, is, that the one happened before the doctrines which relate to the suite were well understood or disseminated; and

(z) De Callieres Man de Negoc. 2. 294.

(a) Fo. 211.

(b) Lib. 2. Diff. 13.

(c) De Call. ut sup.

that

FROM THE FIFTEENTH, TO

that the other forms an *exception* to the general usage, which will not impugn the general law. Since, according to the observation of Bynkershoek, upon one of these very examples, "one single decision, of one single State, cannot do away the Law of Nations itself." (d)

I cannot quit this interesting and remarkable subject without observing, that the privileges in question have been carried by some to an extent even greater than that which we have been examining. In the *Treatise of Vattel*, we find the following positions :— That although the Sovereign to whom an Ambassador is addressed, is particularly called upon to protect him in his privileges ; yet that the same duty extends to other Sovereigns to whom he is not addressed, but through whose country he is obliged to pass for the purposes of his mission. To insult him, says *Vattel*, is to affront his master and his whole nation ; to arrest him, or to offer violence to his person, is to wound the rights of Embassies which belong to *every* Sovereign. (e)

(d) Sed una unius Regis sententia, non efficit Jus Gentium. De For. Leg. c. 19.

(e) *Vattel*, 4. 7. 84.

This doctrine arises out of some considerations upon the case of *Rincon* and *Fregoze*, Ambassadors of FRANCIS I. of France, the one to the *Porte*, the other to *Venice*. These Ministers passing down the *Po* in their passage, and being suspected of bearing dispatches prejudicial to the interests of the Emperor *Charles V.* were set upon and murdered, apparently by the orders of the Governor of Milan. But the Emperor, although at that time at peace with FRANCIS, appears not to have been inclined to punish the authors of the murder. Upon this transaction *Vattel* observes, that it was an atrocious attempt against the Law of Nations; that FRANCIS had not only a very just cause for war against the Emperor, but also to demand the assistance of *all other nations* in its support. For it was an affair, not of two individuals, who each of them supposed they had right on their side; but of *all States whatsoever*, who were interested in maintaining the rights of Embassy. (*f*)

It perhaps does not fall exactly within the scope of this Treatise, to examine whether

(*f*) *Vattel*, 4. 7. 84.

this

this opinion is really law as it is received at present. But we may venture to observe, that in this position, *Vattel* stands sole. At least all the authors on the Law of Nations who have preceded him, after discussing the point at length, have come to a conclusion directly the reverse of his; and that which they have concluded, is supported by a great variety of cases, both of an antient and a recent date. Thus *Albericus Gentilis*, upon this very case of *Rincon* and *Fregoze*, observes merely "Probrosus id Carolo fuisset." (g) Sed alia Questio est, adds *Bynkershoek*, de jure LEGATIONIS, alia de jure honestatis. (h) *Grotius*, who followed *Gentilis*, after having given his opinions at length upon the inviolability of Ambassadors, says expressly, that it is only to be understood to be binding on those Sovereigns to whom they are sent, "Non pertinet ergo hæc Lex ad eos per quorum fines, non accepta venia, transeunt legati." (i) It is true, the non accepta venia, may be made by some to amount to an inviolability, provided they have pass-ports. But it may be fairly questioned, whether the

(g) De Legat. 2. 3.

(h) De For. Legat. c. 9.

(i) D. J. B. et. P. 2. 18. 5.

possession of a pass-port itself, can confer any thing more, than the common protection to which common aliens have a right. *Bynkershoek* at least, without taking notice of pass-ports at all, understands *Grotius* to mean, generally, that the privilege in question shall not have place in countries to which Ambassadors are not addressed (k). Of this opinion also, were *Zouch*, (l) *Wicquefort*, who has been deemed the very champion of the rights of Ambassadors, and who decides that the case of *Rincon* and *Fregoze*, though an atrocious murder, was *not* a violation of the Law of Nations, as to Embassies; (m) *Huber*; (n) and lastly, *Bynkershoek*; who had particular occasion to examine the point, but a short time before *Vattel*. (o) The subject

(k) De For. Legat. c. 9.

(l) De Jur. Feial. 2. 4. 18. ap. eund.

(m) De L'Ambass. 1. 433. 439.

(n) De Jur. Civ. 3. 12. 28. Obligatio autem de non violando, duntaxat inter mittentes et eos ad quos mittuntur legati intercedit ad tertium non pertinet. Qui proinde contra Jus Gentium non peccat, Si hostilia meritos tanquam hostes accipiat, iisque damnum aut exitium inferat, cujus rei exemplum historiæ multæ suppeditant.

(o) The Treatise De Foro Legatorum, was written on the occasion of the Arrest of the Duke of Holstein's Minister in Holland, 1720, and was published 1721.

came before the latter in considering the meaning of the passage, "Heir te lande, "komen de, residerende of *passerende*," which formed part of a declaration of the States General in favour of the inviolability of Ambassadors; and the difficulty was, to know whether the word, "*Passerende*," was applicable to Ambassadors to *other* powers, *passing through* Holland, or confined simply to those addressed to the States, coming, residing, and passing away, or retiring. To solve this difficulty, he enquired into the opinions of the Jurists concerning the point in discussion, and determined that it applied solely to Ambassadors who were addressed to the States. (p)

These authorities are also supported by abundance of cases, of which, exclusive of that of *Rincon* and *Fregoze*, which authors, as we have seen, have contended did not amount to a violation of the Law of Nations, I shall also select the following.

HENRY II. of France sending the Marechal de *St. André* to EDWARD VI. of England, the Queen of *Hungary*, who governed the

Low Countries, endeavoured to take him on his return, between Dover and Calais. There was at that time peace between *France* and *Spain*, but HENRY soon after published a memorial of grievances against the latter, among which he mentions this attempt against his Ambassador, as a breach of the peace. He, however, does not make it amount to a violation of the *Law of Nations*, because *St. André* had not been addressed either to *Spain*, or to the low countries, as *Ambassador*. (q)---SELIM II. in the sixteenth century, being at peace with *Venice*, but meditating war, sent a Minister to the King of *France* to know his sentiments of it. He endeavoured to pass through *Venice*, but was arrested, and the French Ambassador there, and the King himself, claimed his liberty as addressed to *them*.—But they were forced to yield to the arguments of the Republic; *that a sovereign power need not recognise a public Minister as such, unless it is to him that his credentials are addressed*. (r)---The Republic of *Poland*, having elected HENRY Duke of Anjou to be their King, sent Ambassadors to *France* to announce his election. As it was against the

(q) Wicquefort, I. 177.

(r) Wicquefort, I. 177.

interests of the *Emperor*, they feared that pass-ports through *Germany* would be refused them, and they therefore set out without them. In their way through *Saxony*, however, they sent to demand a pass-port of the *Elector*, *who notwithstanding they were Ambassadors*, expressed his surprise that they should attempt to pass through his country, and ordered them to be detained. (s)—In 1572, *ELIZABETH* of England, having reason to be jealous of the machinations of the French in *Scotland*, arrested all Frenchmen passing through the kingdom to that country without pass-port. Among these was *Du Croc*, the French Ambassador to *Scotland*, and his Court complained loudly of this as a violation of the *Law of Nations*. But *Walsingham*, the Secretary, pleaded, that as it was *Du Croc's* own fault for not taking a pass-port, he might justly be detained, and with this plea the French were content, notwithstanding his quality of *Ambassador*. (t) In 1603, *Gregory Barbarigo*, being sent Ambassador from *Venice* to *Great-Britain*, stopped in his passage in the State of

(s) *Id.* i. 188.(t) *Wicquef.* i. 439.

the *Grisons*, the ally of Venice; and having business with the French Ambassador, he remained there for some time: But his expences and festivities not suiting the chastened simplicity of the *Grisons*, they ordered him to retire. A question, says *Wicquefort*, arose upon this, whether it was not a breach of the *Law of Nations*, which, (*Barbarigo* not being addressed to the *Grisons*,) he determines in the negative. (u)—Again, it is a part of the privileges of Ambassadors to be covered of right before crowned heads.—In 1641, the *Portugal* Ambassador to the *States*, passing through *England*, demanded audience of the King: It was granted, but upon condition that it should be as an *individual*, not as Ambassador, and consequently that he could not be allowed the usual ceremonial. (w)

These cases, which are thus both the effect and the support of the above-mentioned authorities concerning the inviolability of Ambassadors passing through third States, are in direct opposition to the opinion of *Vattel*; and it is not a little remarkable that that

(u) *Wicquef.* 1. 172.(w) *Id.*

writer, although he quotes the case of *Rincor* and *Fregeze* as a kind of *vehicle* of his opinion, has not fallen upon one as an authority for it.

I cannot finally conclude this history of the doctrine and precedents concerning inviolability, as upheld in former times, without taking notice of the celebrated and interesting case of the unfortunate Queen of Scots. As this produced the greatest question that was agitated during the sixteenth century, or perhaps in the history of Europe, has much reasoning on both sides, and few or no examples of this sort either before or after it, I shall make no apology for going into a full review, not of the crimes or innocence of MARY, but of the right of ELIZABETH to put her to death, and the extent of the precedent formed by the transaction. And herein I shall confine myself strictly to the case as it actually happened.

In 1567, MARY Queen of Scotland, in her own right, having married Bothwell, Duke of Orkney, a man of known profligacy and daring ambition, who had murdered her former husband, and was endeavouring to get into
his

his possession the person of JAMES, Prince of the kingdom; many nobles of the realm conspired against him, and associated for the defence of James. In the manifesto which they put forth they disclaimed all violent intentions against their lawful Sovereign MARY, and professed to take arms solely against *Bothwell*. The event of their undertaking was the flight of their enemy and the imprisonment of the Queen, whom, being thus in their power, and having no lawful authority to do so, they resolved to depose. Equally destitute of such authority, they assumed the title of the *Lords of the Secret Council*, and without any other right, arrogated to themselves the whole regal power.---MARY, under duress and impressed by various Lords and the English Ambassador, with the notion that deeds made in such a case were void in law, signed certain instruments by which she surrendered the whole of her authority to her son, and constituted the Earl of *Murray* Regent of the kingdom. The Prince was crowned in form; the government was thenceforward carried on in his name, and a Parliament was summoned in which the resignation of the Queen was declared valid, and the whole of the

proceedings against her pronounced to be lawful. In this situation of things she escaped out of prison, assembled an army, and declared that her resignation was extorted from her by force. This was confirmed by a council of her Nobles, who pronounced, in consequence, that all the proceedings against her were illegal. She afterwards fought and lost the battle of *Langside*, and having been previously invited by Elizabeth, (x) who promised to give her the reception of an *Ally* and a *Queen*, took refuge in England, and was publickly received at Carlisle. (y)

Being thus in the power of *Elizabeth*, great debates were instantly held concerning the manner of her disposal, the leading features

(x) * She sent John Breton first to her (*Elizabeth*)
 " with a diamond, which she had before received from her
 " in token of mutual kindness, to let her know she would
 " come into England, and crave aid of her, &c. &c. to whom
 " Queen Elizabeth most largely promised all the love and
 " kindness of a sister." *Camd.* 109. So also, in another
 place, " The Queen had, by Henry Middlemore, made
 " her a large promise on the word of a Prince, of all cour-
 " tesy and kind hospitality, &c." *Id.* 370. See also *Anderson's Collections*, 4. 2.

(y) Roberts. *Hist. of Scot.* Bks. 4. 5.

of which, and the considerations drawn up in writing for the better guide of the chief Counsellors, will assist us much in our judgement concerning the real ideas which were entertained of her. As soon as she was at Carlisle, it was thought wise that no one should be allowed to come to her without the knowledge of *those who had the charge of her*, and that all Scotch Noblemen of the French party coming into England should be "*stayed*." It was also resolved, that if the party which had deposed her should demand to have their cause heard by the Queen of England, it should be granted, upon the ground of *the antient prerogative of the Crown of England to take cognizance of any controversy moved concerning the Crown of Scotland*; that this was particularly necessary at this time, because the Queen of Scotland had heretofore openly challenged the Crown of England, "*not as a second person after the Queen's Majesty, but afore her*." It was determined that she should on no account be suffered to pass into France, because that might renew the league between that country and Scotland, to the detriment of England. It was determined, that if she remained

in England, she should not be allowed her liberty, because, according to Camden, "as she was the very pith and marrow of sweet eloquence," she would use it to increase her party in favour of her immediate views upon the Crown, *without waiting for the death of Elizabeth*; "and no man would think but that such a swete bayte would make concord between her and all her subjects in Scotland." She was not allowed to retire back to Scotland, "because England in time would be abased, and the Queen herself would not long have continuance."—Sir Francis Knollys, one of the keepers at this time, of Mary, describes her as of a bold aspiring spirit, thirsting after victory, for the sake of which "pain and peril seemed pleasant to her, and wealth contemptuous and vile." (2) She had asserted her direct title to the Crown of England *before* that of Elizabeth, and had always refused to ratify the Treaty

(2) Knollys' account discovers much penetration and ability in himself, and is one of the best-drawn characters of Mary, as to one part of her disposition, that appears upon record. "And yit this Lady and Princess is a notable woman; she seemeth to regard no ceremonious honor beside the acknowledging of hir Estate Royal. She
" sheweth

Treaty of Edinburgh, by which that *pretension* was to be laid aside. "Now what is to be done," says *Knollys* writing to *Cecil*, "with such a Lady and Prince, or whether such a Princess and Lady be to be nourished in one's bosom, or whether it be good to halt, and dissemble with such a Lady, I refer to your judgment. If her Highness (*Elizabeth*) think it good to stay the coming of the French into Scotland; if her Highness think any peril towards her; if her Highness think any Princes or Potentates, or

sheweth a disposition to speyk motche, to be bold, to be pleasant, and to be very familiar. She sheweth a great desyre to be avenged of hir enemies. She sheweth a rediness to expone hirselfe to all perylls, in hope of victory. She desyreth motche to hear of hardiness and valiancy, commending by name, all approved hardy men of hir country, althoghe they be hir enemies; and she concealeth no cowardness evin in hir friends. The thyng that most she thirsteth after, is victorie; and it seemeth to be indifferent to hir, to have hir enemyes dimynished either by the sword of hir friends, or by the lyberal promysis and rewards of hir purse; or by division and quarrels raised among themselves: so that for victorye's sake, pain and peryll seemeth pleasant unto hir; and in respect of victory, wealth and all things seemeth to hir contemptuous and vyle." *Anderfons*'

Collect. 4. 72,

" that

" that any factious subjects may conspire
 " against her; then I am sure she will think
 " it good policy, rowndly and plainly to as-
 " sist her own cause. I think it an honour-
 " able quarrel in her Highness to expel the
 " French, and the easiest way thereto is to
 " aid and countenance the Regent (*Murray*)
 " in time." In another letter he says, " The
 " cold dealing of the English will not satisfy
 " her fiery stomach, and that unless she be
 " removed *as a prisoner*, she will not go far-
 " ther into the realm." (a) The Privy Coun-
 cil, in their memorial on the subject (June 20,
 1568,) also assert the prerogative of England
 over Scotland, and accuse her vehemently of
 a design upon the English throne. " What
 " contracts," say they, " what promises,
 " what aids, what oaths, can be imagined to
 " withstand her appetite to this crown." This
 they again ground upon her former strong
 assertion of her pretensions, and her refusal
 to ratify the Treaty which had settled them. (b)
 Hence, according to *Camden*, they resolved to

(a) See *Camden*. 111, 113. *Anderson*. 4. 34 to 42. The above arguments are taken from papers in Cecil's own hand.

(b) *Anderson*. 4. 102 to 106.

treat her as a prisoner, and actually detained her "*as taken by the right of war.*" (c). The injustice of this was resented by many of her own subjects in Scotland, who, in a spirited remonstrance sent to Elizabeth, told her how much it was against her princely honour to detain her *as a captive*, "and that other Sovereigns would find remedy therefore." (d) At the same time she was treated in all formal proceedings as a true and lawful Queen. In the well-known commission given to the Duke of Norfolk and others to enquire into the matters betwixt her and her subjects, she is called by Elizabeth, "Our dear Sister and "Cousin, Mary Queen of Scots." Her son, through the whole of the famous conferences at York and Hampton Court, is styled by the English no more than "the Prince her "son;" or, sometimes "the Prince acknowledged King by the Nobles of Scotland;" and after those conferences were put an end to, the Bishop of Ross was allowed to remain with proper credentials, as her Ambassador at the English Court, (e)

(c) Camden, III,

(d) Anderson. 4. 122.

(e) Id. 4. second part. 4. 14, 18, 33, 38. 3. Leslie's Negotiations,

Now

Now from these naked circumstances of the case, two things seem not unfairly to be implied: I. That the English Council (with what justice is not here the question) detained Mary from the first as an enemy, aspiring to the Crown of their Queen, fomenting and favouring the parties which were known to be adverse to her interest and security, and as such justly (*in their opinion*) liable to be imprisoned. II. That they considered her as a real Sovereign, and allowed her all the rights of an actual, though hostile and captive Queen. And hence I would argue, that the act of imprisoning her, at first disguised, but afterwards avowed and defended against all who concerned themselves in it, was a direct act of hostility of Elizabeth against Mary. "I, for my part," says the former to the French King, "do detain the Queen of Scots in honourable custody, for the safety of England, and mine own security; and for it I have examples of the French, who shut up *Chilperic* in a monastery, Charles of *Lorraine* in a deep dungeon, and *Sforza* Duke of Milan in an iron grate, to secure their own estates. Finally, however, (she is obliged to confess,) *such*

" great

“ *great examples as these do always carry with them some kind of injustice.*” The conclusion of this celebrated affair was equally unjust on the part of the English, with its commencement. The Government, considering Mary as their most potent enemy, had long resolved upon her death; but neither the temper of England, nor the maxims of the world, would have borne them out, if by a barefaced use of the right of power, they had cut her off without deigning to assign a cause; they therefore coloured their intentions with the appearance even of law, and passed that well-known and unjust act, by which the life of this unfortunate Princess was made actually to depend upon the deed of another, of whom she might absolutely know nothing, much less be privy to his actions. Seventeen years after her first detention, a law was enacted, by which, if any attempt was made against her Majesty’s life, *by or for* any person pretending a title to the Crown, the Queen was empowered to nominate twenty-four persons to examine and pass sentence of death on the same; and if the attempt took effect, then not only those *by or for* whom the act was perpetrated, but their issues also, being

being any way privy or assenting to the same, might in like manner be pursued to death. (f)

It was upon this statute that *Mary* was tried and condemned; and, previous to the execution of it, it will not be uninteresting to consider the reasoning that prevailed at that time, in order to justify the intended severity of the English Ministry. So early as 1572, above fourteen years before her death, the Parliament had addressed the Queen to proceed *criminally* against *Mary*, as one who had attempted to disturb her government; (g) for which purpose they proceeded to a very full but inapplicable detail of reasons for her death, founded, not upon the right of the English to *try* her, but the necessity for punishment in general. They also built

(f) State Trials. i. 103.

(g) Strype's Annals. 2, 134 to 137. The political severities of Burleigh and Walsingham seem there to preponderate over those of *Elizabeth* herself. The former, writing to the latter, when Ambassador in France, has these words: "Our news is, we are presently in hand to at-
" taint the Scottish Queen of Treason. And yet we fear
" our Queen wil scant agree to it."

much

much upon that new ground which, as we observed in the beginning of the present Chapter, had in this century been taken as a foundation for very contrary public maxima among Protestants and Catholics. According to this, the Queen of Scots was treated as the adversary of God, and a conspirer against the gospel of Christ in all countries; and they quote, for a precedent, the execution of *Licinius* by "his fellow Emperor," Constantine, because he had laboured to subvert the Christian Religion. (b) In their petition also to the Queen, they call *Mary* "a Queen of late time, but now justly no Queen; a nigh kinswoman to her Majesty, but a very unnatural sister." "And albeit," they continue, "upon her *first* coming, your Highness might, both by *law* and *justice*, have dealt with her *judicially*, for her attempts made, by writing and otherwise, against your Crown, yet she has had your Majesty's *most gracious protection*, and you have dealt with her like a good and natural sister." They then go on to petition, that if hereafter any attempt shall be made against

(b) D'Ewe's Journals. 208, 209. We shall soon see what the real case of *Licinius* was.

the Queen by her, she may be adjudged to death as a *Traitor*, without any farther trouble of Parliament; and not only this, but if any attempt be made to deliver her out of prison, *she being assenting to the same*, the persons making the attempt, and *she herself*, may be in the same manner condemned. They then flatly deny that Sovereigns are inviolable, and quote precedents, which are vainly thought to bear them out in their ideas. (i) To the consideration of these we shall come in their proper place. Mean time, it requires little attention to be sensible of the extreme injustice, to call it by no harsher name, of attempting to pass a law for the death of a prisoner, shut up by the sole right of power, and upon political motives, in case she should endeavour to escape out of prison; nor is there any reader but must be struck with the inconsistency of this grave public body, when they assert that this injured woman had enjoyed the *protection* of Elizabeth, and therefore might be proceeded against for *Treason*.

(i) D'Ewe's Journals. 215, 217, 218, 219. See also Strype's Annals, 2, 134, et infr.

In 1585 passed the fatal statute abovementioned. The Parliament *apprehending*, says *Strype*, that she was concerned in the conspiracies of Spain, moved for the taking her off; but men were not agreed as to the manner of it. The dark-minded *Leicester* proposed poison, and sent a Divine privately to *Walsingham*, to satisfy him that it was lawful; (j) but though *Walsingham* refused, and thereby saved his reputation, yet by supporting the conduct that was actually pursued, he probably did more real mischief, inasmuch as he promoted what at best perhaps can only be called a legal murder. In order the better to countenance this, a book was put forth to consider of the lawfulness of putting Mary to death as a Sovereign, all preliminaries being taken for granted, that she had really enjoyed the protection of England, had remained there at liberty, and had been guilty of the crimes alleged against her. In this book the following case was considered at large :

“ A Sovereign Prince, acknowledging no
 “ superiour, in distress at home, flyeth
 “ to the kingdom of his *Confederate*, be-
 “ ing likewise a Sovereign Prince, and

(j) *Camd.* 346.

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“ is

" is by him received into protection ;
 " yet kept in safe custody, as having been
 " a Competitor afore of that kingdom,
 " where he practised by open fact against
 " the life and the kingdom of that Prince.
 " Whether may such the practiser be
 " therefore justly put to death ?" (k)

Upon this celebrated question, issue was
 joined by the civilians of the time, although
 it was easy to see, in the account that was
 published for the satisfaction of the people,
 what was the predominant spirit, from the
 scantiness of the objections, and the fulness
 of the answers. On the part of the Queen
 of Scots, it was contended,

I. That she was an anointed Queen as well
 as Elizabeth, and that *par in parem, non ha-*
bet potestatem.

II. That she came into the kingdom, sub-
 ject only to the Law of Nations, and there-
 fore not amenable to the municipal jurisdic-
 tion.

To this it was answered, that she had
 been deposed by her subjects, and therefore

(k) Strype. 3, 299.

was

was not to be considered as a Sovereign ; but that even if she were Queen of Scots in possession, yet she was a *feudatory* to Elizabeth, and consequently might be tried ; that every Prince, not in his own territories, *parts with his inviolability in the country where he resides* ; that it was known law, that all persons committing crimes were subject to be tried for them in the countries where they committed them ; and that if a Sovereign coming into the territories of another, were not to be thus subject, his condition would be better than that of the lawful Prince ; that with respect to the Law of Nations, it is denied that Queen Mary was only subject to them, since all aliens are subject to the *positive* law of the land, and that in matters of *Treason* there can be no difference of persons, whether Sovereign or not ; that the nature of *Treason* is such, *as that the punishment thereof is not tied to any law* ; that a King passing through another King's realm, or there resiant, is but a private person, and may commit *Treason* as another private man.

By this time, therefore, the case had assumed a new shape ; and leaving out the con-

sideration that Mary had from the first been treated as an enemy, and imprisoned as such, a doctrine was now set up which had not before been thought of by the Government, that Sovereigns in foreign countries should be considered as *common aliens*, and upon the supposition of having enjoyed the protection of the laws, should be deemed amenable to their power. To support this, the history of the world was ransacked for cases, wherein Sovereigns had been punished by fellow Sovereigns, although whether they had been punished *judicially*, or whether they were as perfectly independent as those who punished them, did not seem to come into the enquiry. Dr. Dale, however, (the same who had been consulted on the Bishop of *Ross's* case,) upon being again applied to by *Burleigh* for the satisfaction of her Majesty, gave it as his opinion, that nihil est in toto jure certius, than that the Queen of Scots having committed a crime in England, might there be judicially tried. (1)

Into the particulars of the precedents quoted we shall now proceed to enquire, and not

(1) Strype. 3. 365.

THE SEVENTEENTH CENTURY

one of them perhaps will be found to support the reasoning we have detailed. They were in number five; those of *Dejotarus*, *Licinius*, *Conraddin*, *Robert*, and *Joan*, (m) the three latter, Sovereigns of *Naples*.

Of these the first is inapplicable, since *Dejotarus* was a *tributary* and *conquered* King of *Galatia*, and, according to the known custom of the empire, forced to submit to the Roman jurisdiction. He had besides been deprived of his dominions by *Cæsar*, for adhering to *Pompey*, although afterwards restored to a part of them. He was therefore every way inferiour to the Dictator, and when accused of a design against his life, was called upon to answer for his crime, trusting to such equity in the form of trial as a conqueror chose to award him. We may add also, that although the oration of *CICERO*, in his behalf, proves that he was called upon to answer, yet it was to *Cæsar* himself, and no sentence was passed in the cause. (n) The second case is still less applicable, since, what

(m) Strype. 364. Append. B. 2. N. 1. Camden 371.

(n) Middleton's Life of Cicero. 2. 215, 16.

ever may have been the crime of Licinius, or the manner of his death, about which there is much obscurity, it is at least certain that he was no longer Sovereign when he was put to death. He had been conquered in open war by *Constantine*, had been deprived of regal power, and had retired a humble individual to *Thessalonica*, where, according to *Eutropius*, “contra religionem sacramenti, *privatus* “occisus est. (o)” Upon the third case of *Conraddin*, we have already observed much in another part of this work. (p) It will be recollected that he entered Naples in open war, and was conquered in battle. Although, therefore, he might have been proceeded against as an enemy, yet none but such ignorant and barbarous times could have allowed the propriety of proceeding against him by a judicial process. Even as it was, also, we pointed out that the transaction did not pass without censure on the ground of its irregularity, from the public lawyers of the time. (q) With re-

(o) L. 10. 6.

(p) Vol. I. p. 257, 258.

(q) Succaria, the most famous lawyer of his time, wrote a book expressly to prove this act of Charles to be against the Law of Nations. Hist. de Sicile par Burigny. 2. 174.

spect to the case of JOAN, it would be wonderful how it could have been offered at all, had it not been necessary to blacken the character of MARY, by drawing a parallel between her and the Neapolitan, which was done in all due form by the Parliament, and offered to the Queen. (r) With the characters of these two Princesses we have here nothing to do. With respect to the force of the precedent, it is well known that *Joan* was executed *flagrante bello* by her conqueror, *Durazzo*, without any form of judicial process, and consequently it could not consistently be made the foundation for proceeding *juridically* against MARY. The remaining case of *Robert* was most relied upon by the Civilian, *Dale*, who lays great stress upon the opinion of Pope CLEMENT V, who reviewed and cancelled the judgment of the Emperor against him. The opinion is as follows:
 " Quod si punitio criminis intra districtum
 " Imperialem commissi, ad Imperatorem *for*san
 " pertinuisse asseratur; verum est quidem, si

(r) See " The analogy or resemblance between Joan Q. of Naples, and Mary Q. of Scotland." Strype. 3. Append. 2.

"*in eodem districtu fuisset inventus delinquens.*"^(s)

If we examine, however, the case which gave rise to this opinion, we shall find it equally inapplicable to that of *Mary* with the rest. *Robert* King of Naples had opposed with an armed force the progress of *Henry VII.* in Italy, upon which that Emperor resolved to depose him *as his vassal* who had taken arms against his superiour Lord. For this purpose he assembled a council at *Pisa* in 1313, where, according to *Struvius*, *tanquam vasallum quod Florentinos, &c. &c. ad rebellionem concitaverit, et Pisanos Imperatori fideles infestaverit; ad Imperialem curiam vocatus, non comparaverit, proscribit, omnesque vasallos ac subditos a vinculo fidelitatis absolvit.* (^t) In this transaction therefore we see the mere act of a Lord Paramount against a rebel subject; of a German Emperor putting his vassal to the Ban of the Empire. The reason why the sentence was reviewed by the Pope, was, because the sentence was passed in a country, not within the Imperial, but the Papal jurisdiction; and consequently the Emperor's

(s) Strype. 3. 365.

(t) Struv. Corp. Hist. Germ. P. 9. S. 4, 14.

authority to pass any sentence at all, was questioned. With respect to his opinion, that if *Robert's* act of delinquency had happened within the Imperial territory, he might perhaps (*forſan*) have been subject to his jurisdiction, it is not only very faintly expressed, but the point must depend upon the fact, whether the Emperor held the King of Naples to be his vassal or not; and at most it can be taken but as a mere obiter dictum.

Such, however, were the ideas, and such the cases to support them, which were entertained by the English Statesmen and Civilians in the sixteenth century, upon this part of the Law of Nations. Yet the point was not so clear, even in those times, but that *Mary* was aware of the arguments that were to be brought against them: and we may remark, that the man who seems to have best understood the matter, that is, the most consistent and legitimate way of proceeding against her, was *Morton*, her declared enemy, who, without seeking to colour the affair with pretexts which he probably knew were illegal, proposed boldly that she should be sent back into Scotland, and put to death

(I suppose as an open enemy) in the very frontiers and borders of both kingdoms. (u) When Mary herself was called upon to plead to the jurisdiction of the Court which tried her, she asserted, with firm dignity, that "she
 " was no subject, and would rather die a
 " thousand deaths than acknowledge herself
 " to be one, considering that by such ac-
 " knowledgment she should both wrong the
 " sublimity of Regal Majesty, and withal
 " confess herself to be bound by all the laws
 " of England, even in matters of religion." She afterwards objected to the statute that had been made against her, and asked the Commissioners by what law they intended to proceed; and so low in her estimation (possibly without much injustice) were the English Civilians, that she told them, if they meant to act upon the Civil or Canon Law, they must send for interpreters of it from *Pavia* or *Poitiers*, or some *foreign* Universities, for in *England* none fit for it were to be found. "If I am to be tried," says this dignified Princess on other occasions, "who
 " shall be my Peers? Whereas the Queen
 " writes, that I am *subject* to the laws of

(u) Camd. 346.

" England,

“ England, because I have lived under their
 “ protection. I answer, that I came into
 “ England to crave her aid and protection,
 “ and have ever since been detained in pri-
 “ son.” *Hatton*, one of the Commissioners,
 told her, that her plea was bootless. “ You
 “ say you are a Queen! Be it so. In such
 “ a crime as this, *the Royal Dignity itself* is
 “ not exempt from answering, *neither by*
 “ *the Civil, nor Canon Law, nor by the Law*
 “ *of Nations, nor of Nature.*” *Bromley*, the
 Chancellor, made use of the same sort of
 language, but with little effect; and the only
 argument which overcame her firmness, was
 one peculiarly calculated to make an impres-
 sion upon the mind of an innocent woman,
 (if indeed we can suppose her to be so!)
 anxious to clear her sullied reputation. Al-
 though she had refused to answer juridically
 as a subject, *Mary* had constantly expressed
 a wish that her conduct should be examined;
 and *Hatton* urging to her, that all were as
 anxious as herself to prove her innocence,
 and that by denying the power of the Court,
 she would give rise to the suspicion that she
 only meant to avoid examination, she yielded,
 though, says Camden, “ with much adoe and
 “ ill will, lest she should seem to derogate
 “ from

" from her predecessors 'or successors." (w)
 The event is well known ; and I have only
 to add, in order to complete the history of
 the facts of the case, that after many debates
 among the Crown Lawyers as to the designa-
 tion of *Mary*, she was called in the record and
 the commission, " *Maria, filia et hæres Ja-*
cobi Quinti, nuper Regis Scotorum, com-
munitè vocata, Regina Scotorum, et Dota-
ria Franciæ." And this was done because
 " to have called her directly and precisely
 " *Regina Scotorum*, could not well be war-
 " ranted in law." (x) She was at the same
 time allowed to wear all her badges of Dig-
 nity and Royalty till after her condemnation,
 when they were stripped from her in form,
 by *Powlett*, her then keeper. (y)

Thus far, throughout this interesting trans-
 action, we have studiously confined ourselves
 to the facts, and the reasoning of the times, as

(w) Camden. 348, 49, 50, 51, 52, 53, 54, 60, 61,
 70, 71.

(x) See Popham (Attorney General's) letter on this
 subject. Strype 3. 364.

(y) Camd. 369.

they actually happened, without going into that great question which here was so decidedly argued upon, "*that a Sovereign, resident in the dominions of another Sovereign, may commit treason, and be tried for it, or any other crime, in the courts of the land.*" Upon that question we are now called upon to remark, and in our opinion, nothing was decided upon it in point of fact, by the case before us. For although, by an attention to it, as thus minutely stated, we may discover much *reasoning* for the *affirmative*, yet neither was any *fair* precedent quoted, nor does the case itself amount to one, if all the circumstances are considered. Mary had never been that free agent in the kingdom of her Sister Queen, so as to constitute the case of an Alien Sovereign protected by the Law and infringing it, which must always be supposed before we can go into the question at all. She had also, as we have seen, been detained prisoner from the first, by *right of war*; and under this view of the matter, it may be said to amount to no more than the case of a prisoner of war, detained always in prison, and assenting to an act against the life of his Conqueror; in which the true manner of
pro-

proceeding against him would be in the summary way of martial law, without having recourse to the municipal courts of the country: Of this opinion was the Civilian Zouch, when, a century afterwards, he came to review this celebrated transaction; he holding expressly, that no Sovereign can be regularly tried in the courts of another Sovereign, although he may, upon provocation, be proceeded against in open violence, in the same manner as if he had remained at home, and war had been declared against him. And this he affirms, with reason, to be a full answer to the argument against the immunity of Sovereigns, that if it were allowed, the foreign would be in a better condition than the native Prince. (z)

The whole therefore, in our opinion, that the case of Queen Mary can in fact amount to as a *precedent*, is this; that a Sovereign Prince, in the territory of another Sovereign Prince, *detained by right of war*, and treated from the first as an *Enemy*, was, upon conspiring against

(z) Et si cum in territorio principis in quem conjurarunt deprehensi sunt, præsentī vindicta uti melius videtur; juri gentium convenit pro hostibus declarare, unde; *non expectato judicio, cuivis eos interficere impune liceat.*

Solut. Quæst. de Jud. Leg. &c. &c. 84.

the

the life of his Conqueror, put to death, by the decree of a Court expressly erected by law to watch over his attempts, and enquire into the truth of the facts. Whether it was necessary to erect such a Court by law, and for such a purpose, is another question; and, at any rate, to try an enemy, taken and detained prisoner by right of war, in the common Courts of the country, is too notoriously *irregular*, to need any comment at all. With respect to the question, whether a paramount Sovereign, *at peace* with another, *freely* residing in his country, and committing a crime either against the positive law of the land, or against the law of nations, is subject to the municipal jurisdiction of that country; whether this was sound law, although it must be confessed that such was the length to which the English Government meant to carry it, the case in our opinion, decides nothing. For, whatever may have been the reasoning of the Statesmen, the Parliament, or the Judges; as *a fact*, it cannot be made to go farther than what has actually been stated. At the same time, that reasoning is left upon its own ground; and whether as an abstract proposition it is sound,

or unsound, we pretend not to decide, contenting ourselves with having shewn, that, if it is the former, it is at least not supported by any *full* case in the history of the world.

Others again endeavour to throw the case of Mary entirely aside, by assuming all the way through, that she was in reality *not a Sovereign* when she came into England, or at the time of her trial; and of this opinion is *Vattel*. (a) I fear, however, that the facts will not support this sort of reasoning. The whole of what has been stated, shews very clearly, that Mary came into England an acknowledged Queen; and as such her Ambassador (*the Bishop of Ross*) at the English Court, was, even upon notorious delinquency, allowed his privileges.—As such also she was considered in all the reasoning of the Statesmen and Civilians concerning her; and her dignity was expressly acknowledged whenever those difficult questions concerning the right and manner of punishing her were discussed. And though the Parliament af-

(a) *Vattel*. 2. 7. 108. Le fameux exemple de Marie reine d'Ecosse, que l'on voit si souvent allégué en cette matiere, n'y vient pas fort à propos. Cette Princesse ne possédoit plus la couronne quand elle vint en Angleterre, & qu'elle y fut arrêtée, jugée et condamnée.

fectcd to call her "the *late* Queen;" and she was described at her trial merely as the "*heirefs*" of King James, yet she enjoyed the respect and the badges of Royalty, and was not stripped of them till after her condemnation.—This manner, therefore, of considering her as a private person, is only calculated, I think, to elude the question which is generally founded upon her case; although it is certain that to those who can consider her as not acknowledged by the English, it will have the effect which Vattel supposes.

With respect to the main question, we are not here called upon to endeavour to decide it, although the opinions entertained upon it, it was our duty to relate. The tenor of these opinions in England we have already shewn; and it must be owned, that whatever may be supposed to have been decided at the time concerning the deposition, or the sovereignty of Mary, the Ministers and Lawyers of England held in the most decided terms, that a Sovereign, acknowledged as such, and residing freely within the territory of another, was liable to be punished for Treason by the courts of the land. Of this opinion also were several foreign Jurists, such as Hottoman and

Arnisaus. At the same time, the reasoning upon which they chose to rest, is liable to decisive objections; for the law of nations was then but little known; and all the arguments concerning it were taken from the civil law of the Romans, the inefficacy of which we shall presently have occasion to discuss. Thus *Hottoman* founds his opinion upon the Roman maxim, that a Magistrate, *out of his province*, is no longer inviolable; (b) as if any parallel could be drawn between a Sovereign Prince, holding his throne from no one, and liable to no jurisdiction, and a Subject Officer holding a deputed authority! It is right, however, to review a position of *Zouch* upon the other side, in which, probably, he trusts too much to the precedent he offers.—In defending the exemption of Sovereigns from *trial*, he goes so far as to say, they are Sovereigns in a foreign country, even quoad their own jurisdiction in criminal causes. This he founds on a case contained in *Fleta*, in which *Ingelram de Nogent* being taken in the Palace of Edward I. of England, when that King was at Paris, for having stolen some silver plate, there was made a question concerning the person who was to try him; and, after some debate between

(b) Ap. *Zouch* Solut. Quæst. 56, 57, 58.

the Steward of the English Household and the French Magistracy, the King of England was allowed the *privilege of his Palace*. If *Arnjæus*, says *Zouch*, had been aware of this case, he would not so rashly have held that Sovereigns lost their privileges in a foreign country! (c) At the same time, from *Zouch's* own manner of relating this precedent, I think it is very doubtful whether it was determined for the foreign King, *as a known and universal custom*, or whether it was not merely a concession, or compliment on the part of the French. The words are,

“Habitis tunc inde tractatibus, in Concilio
 “Regis Franciæ consideratum fuit, quod Rex
 “Angliæ illa regia prerogativa et hospitii
 “sui privilegio, *uteretur & gauderet.*” (d)

*It was agreed that the King of England MIGHT use and enjoy the prerogatives of his Palace!—*At any rate, so weighty a matter cannot be disposed of upon the authority of a very imperfect and antient case, and which at best can only be the foundation of a collateral argument. *Vattel* holds the same opinion with *Zouch*, both with respect to the

(c) Solut. Quæst. &c. 82. (d) Id. 81.

exemption of a Sovereign from trial, and the enjoyment of his own prerogatives over his own subjects in the foreign State. Leaving the latter question, we can only observe, that the reason he contents himself with giving for the former, is far from satisfactory, if it may not even be turned against him. A Sovereign, says he, cannot be subject to the laws in a foreign country, "Car on ne *presume pas* qu'il ait consenti à s'y soumettre!" he therefore holds that we ought to *stipulate* with him before hand, that he shall submit to the laws. (e) It is needless to point out, that if the whole depends upon the mere presumption of what is, or what is not the intention of the Sovereign, we may as well presume that he will, as that he will not submit to the laws. *Vattel* holds, with more reason, that if the Sovereign is guilty of any hostile act, he may be proceeded against as a declared enemy, in the same manner as if he had committed it out of the country. (f)

It may seem somewhat remarkable, as we have contended, in another place, so decidedly

(e) *Droit des Gens*. 4. 7. 108.

(f) *Ib.*

for the exemption of Ambassadors, who are but the representatives of a Sovereign, that we should not contend equally for the Sovereign himself? Upon this, however, we have to observe, that there is a great difference as to the cause for which one Sovereign visits the country of another. If he chuses, if I may use the expression, to be his own Ambassador, and comes to treat of national concerns, all the reasoning grounded upon the necessity for the communication of nations will apply in his favour, and here *Vattel* is also decidedly for him. (g) But if he comes as a mere traveller, or to take refuge, without any business to transact, whatever may be the real justice of the case; he is at least precluded from relying upon that part of the reasoning. He is also deprived of a much stronger argument in favour of Ambassadors, namely, that it is not the intention of the Law of Nations to exempt them altogether, but simply from a foreign jurisdiction; since if their crime be against the law of nature, it is natural to suppose that their own laws will punish them: whereas in

(g) *Droit des Gens*. 4. 7. 108.

the case of a Sovereign, he is amenable to no law in his own country, and consequently the punishment demanded, cannot be executed. Upon the whole, the question, which has been called by *Paschal*, upon another occasion, "Anxia et nodosa," may be reduced to this ; whether, if a Sovereign, being in a foreign country, upon no national business, but on a mere visit of curiosity, or having taken refuge there, commit murder, or any other crime against the law of nature ; it is one of those cases in which the interest and business of the world are more benefited by letting him escape, than the support of the laws is weakened by waving the punishment !

What the Law actually is, or has fairly been upon this question, we profess not to determine. Throughout the case we have been reviewing, we have contented ourselves with stating at large the *opinions* that were held, and the real extent of the precedent in point of fact. We have also reviewed the cases relied upon, and endeavoured to shew their total inefficacy. The reasoning on both sides we leave to the reader, simply observing, that if our sentiments upon the

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whole

whole matter are just, there is at least no case in the history of the world, by which to support the general discussion.

And this will finish what we have to say upon this interesting subject.—Whether in the last case, the proceedings of the English Council were governed solely by their hatred, or their dread of Queen Mary; or whether they bona fide believed their arguments to be founded upon the real Law of Nations of their time, it is perhaps not easy to determine with precision. Certain it is, that however from the various causes we have related, Europe may be said to have been improved in its maxims, much yet remained to be done. The hostilities of nations were still often carried on with the extremity of rigour, and when cases of nicety were started, the ignorance of men were still so great, that they generally fell into difficulty, and often into actions which cast a stain upon their honour. Of the latter, the behaviour of so generous a Prince as FRANCIS I. after the famous Treaty of *Madrid*, is a strong and eminent proof.—Every one knows the price which this King had paid to CHARLES V. for his

Q q 4

liberty,

liberty, after the battle of *Pavia*. He agreed, amongst other things, to restore the Dutchy of Burgundy, provided he were first set at liberty, and stipulated that in case he failed, he would upon his honour and his oath return to Spain, and once more surrender himself prisoner to the Emperor. (*b*) Nothing could be clearer than the conduct which, under this agreement, he was bound to pursue; but as he foresaw a very unpleasant alternative, he fell upon a measure which nothing but the ignorance of the times (though comparatively so much improved) could even palliate. A few hours previous to the signing the Treaty, he assembled some of his friends, and after enumerating the arts and the rigour which the Emperor had employed to procure his assent to such conditions, he made a formal protest in the hands of Notaries, that his consent was *involuntary*, and therefore void; and with the intention to break it thus warm in his mind, he immediately afterwards signed the Instrument. (*i*) Scarce was he set at liberty, but the consequence of such intentions was made evident. He joined

(*b*) *Recueil des Trait.* 2, 112.

(*i*) *Id.* 2, 107.

in a league against CHARLES, with the Pope, the Venetians, and the Duke of Milan; and the former, proceeding upon the old Law of Nations, operated upon by the Ecclesiastical Institutions, made use of a power which had not yet been abrogated, (*k*) and as the sole director of cases of conscience, absolved the French Monarch from his oath. (*l*) In virtue of this, and on other pretences, FRANCIS refused to execute several articles of the Treaty, and when the Imperial Ambassadors came to remind him of his obligations, he gave audience in their presence to some Deputies of the States of Burgundy, who stoutly asserted that at the time of making it, he had it not in his power to alienate the dominions of the crown. (*m*) At the same time he refused to return to prison, and these were the subterfuges of the most open and generous Prince of his time, to elude the performance of a Treaty which had restored him to liberty. The respect we have for him, makes us wishful to attribute these unjust and inconsistent operations, entirely to the blindness of his age,

(*k*) See Chap. XIII. p. 125.

(*l*) Roberts, Ch. V. 2. 346.

(*m*) Id. 348.

But

But the rigour of the laws of war during these times, was equally notorious with this ignorance in the interpretation of Treaties; and although there certainly were not those desolating signs of extermination which had marked the earlier wars of Europe, yet men had not yet by any means acquired that softness and polish which a more intimate acquaintance with their duty has since taught them. The Spaniards, partly from their zeal for catholicism, partly from the mere pursuit of their old maxims, continued to condemn prisoners either to death, or to the galleys. (n) The old maxim that no faith ought to be kept with heretics was enforced by Catholics against Protestants. In some countries, even *Christian*, (as in *Muscovy*,) it was supposed to be perfectly compatible with Christianity to commence war without any denunciation; (o)

(n) Rymer's Fæd. 16. 591. Camd. 123;

(o) Camd. 285. It was a Russian Tzar who ordered an Ambassador's hat to be nailed to his head, for insisting upon that part of the ceremonial by which Ambassadors are allowed to be covered before the Sovereign. (Lord Carlisle's Embassy to Russia.) With respect, however, to the necessity of declaring war, it is reprobated even in our own age, by Bynkershoek, Quæst. Jur. Pub.

when

when Christians and Turks came to be opposed together, their old cruelties seemed to revive; (*p*) and in the wars of the *Low Countries*, which broke out during the period before us, there was scarcely a transaction so savage, or a maxim so infamous, but found support and countenance from the Princes of the time. (*q*) At the same time this was the period of great improvements in the laws, and in the arts and sciences, in most of the countries of Europe, and every nation teemed with great men. (*r*)

It is not perhaps altogether impossible to account for this backwardness of the Law of

(*p*) As at the siege of Malthe, where the Turkish General ript out the hearts of the wounded, and cutting gashes in the dead, in the form of a *cross*, tied them to planks, on which they floated with the tide to the town; and where the Grand Master in return, massacred all his prisoners, and putting their heads into cannon, shot them into the camp. Watson's Ph, II. I. 213.

(*q*) Grot, Prolegom, 28.

(*r*) It was the peculiar fortune of the sixteenth century to produce the greatest personages, perhaps, in the whole history of Europe. They were Ch. V. Fran. I. Bayard, Doria, Luther, Erasmus, Hen. IV, the Guises, Coligny, Sully, William I, of Orange, Parma, Gustavus Erickson, Sebastian, Elizabeth, Burleigh, Walsingham, Sidney, Essex, Raleigh, and Bacon,

Nations

Nations in comparison with other improvements. Mankind in fact, had not yet thrown off the trammels in which almost all knowledge had hitherto been held, and if we consider the manner in which public men, even the best intentioned, endeavoured to account for their public duties, we shall not be much surpris'd at their want of perfection in these particulars. It was not till the age of GROTIUS, that they began to be confirm'd in the improved notions which the circumstances we considered in the last Five Chapters had gradually introduced; and we may probably be safe in affirming, that it is to his comprehensive mind and learning, that the law, as construed at present, has chiefly owed its distinguishing regularity. Of so great consequence are sometimes the silent exertions of the closet, to the more active and louder professions, which contend with it for the government of the world!

Wonderful however to tell, although the greater part of the ideas which he promulgated are so clear as to be beyond all refutation; and so natural, that we are astonish'd (considering what has been related) that they

were not adopted before; they were considered as new by the *Doctors* of the *time*; and it was some years before they made their way into the minds of *Sovereigns*, the only persons who could give them effect.

To all these topics we are now hastening, and we have at length to consider the causes which gave rise to the Treatise of this celebrated man; the manner in which it came to be disseminated; the aid which it has met with since, from the publications of various learned persons; and the ultimate and great effect which it has had, in bringing about the system which is followed at present. The deduction of these points will close our enquiries.

C H A P. XVIII.

THE AGE OF GROTIUS.

THE Law of Nations then about this period, was a vague and indeterminate phrase in every body's mouth, but with few precise ideas annexed to it. It consisted, as we have observed, in the various discussions we have had occasion to review, of a string of undigested precedents, the facts even of which were but little understood, so that they might be made to bend almost every way that suited the purpose of those statesmen who affected to take them for their guide. Little of science, drawn from general rules or analogies, was thought of; fundamental principles were sought for in very different sorts of spirit, and there being no clue, every thing was left on the hazard. Some recognized no law but that of the strongest; others, especially the lower orders, concluded that war put an end to all laws whatsoever; those who were more regular, pretended to be governed by custom, a thing in itself too variable and vague to stand alone, seldom amounting to that universality

versality which only can give it authority, and at any rate often an authority for evil as well as for good.—Others, more philosophical, formed themselves in the schools, and allowed no weight to any one but PLATO and ARISTOTLE, although, according to Grotius, the truth to which Aristotle so much attached himself, had not more mortal enemies than those who made most use of his authority. (s) Those also of antiquity who were proposed for imitation, were followed as implicitly in their visions, as in their good sense. Others again, approaching nearer to the business of the world, intrenched themselves behind the civil law of the Romans, from which they never suffered themselves to wander. As if *Ulpian* and *Papinian* had been infallible, and had been sent down from Heaven to prescribe laws for *all* the world; or as if its various nations were always to find a certain rule of conduct for their intercourse with one another as independent States, in laws made for one integral community, which had long been so totally diffused that few vestiges of its original people

(s) Prolegom. 42.

remained.

remained. Notwithstanding this, however, the greatest public lawyers from the thirteenth to the sixteenth century, adjudged all controversies between nations by the rules of this celebrated law; and the errors of *Accursus* and *Bartolus*, which might be excused by the "Temporum suorum infelicitas," (t) were followed on the same authority, by the two famous Spanish Civilians, *Covarruvias* and *Vasques*, in the very age of Grotius. (u) The general excellence however of this law was such, as to excuse the European States for the high deference which they paid to it: So high, indeed, that it has been said, that whenever our own ordinances and customs fail, "Tunc ad Jus Commune et Romanum confugimus," for that in all uncertainty, the Roman law was a sheet-anchor by which to come to equity, the precepts and duties of civil life being no where so well laid down. (w)

Hence *Albericus Gentilis*, who bore the palm from all the Jurists before *Grotius*, and

(t) Grot. Prolegom. 54. * (u) Id. 55.

(w) Beaver's Hist. of the Roman Law, 135.

was Regius Professor of Civil Law at Oxford, (1585) (x) lays it down that all Sovereign Princes are bound to be governed by it, in the disputes which arise between them. (y) But at the same time this celebrated law was often calculated to lead nations into error. The Roman Empire, though so vast in its extent as to embrace a tract of country more than equal to Europe, had not been, like Europe, composed of different communities independent of one another; but formed one nation under a supreme Despot, whose will gave the tone of behaviour to every one of its members. We have seen into what mistakes this led many of the Civilians with respect to the power of the Emperor over other Princes.— It also, as we have shewn, affected almost all the earlier reasoning which concerned the important privileges of Ambassadors, the word Legatus, the Ambassador of a Sovereign Prince, being, as we observed, p. 520, after *Bynkershoek*, often confounded with the Legatus which meant the mere Deputy of a subject city to Rome, and consequently a subject himself.

(x) Zouch. Solut. Quæst. &c. 176.

(y) De Jur. Bell. c. 5.

In the debates between the French and English for the restitution of Calais, (1567) I find strange ideas of the Law of Nations. By the Treaty of *Chateau Cambresis*, it had been settled that *Calais* should remain in the possession of the French for eight years, and then be restored. The time having expired, officers were sent to demand it *according to Treaty*; but the possession was defended upon the principles of the Roman law. "By the same right," said *Hospital*, Chancellor of France, "that the English demand *Calais*, they may demand *Paris*. The title of the French is as old as the kingdom itself. Though the English possessed it for two hundred and thirty years, *yet the right was in the Kings of France*, and that no less than to the Dukedoms of *Guienne* and *Normandy*, which the English had detained long by force of arms. The prescription of time which they allege, *doth not prevail among Princes*, but the right ever prevaieth; for according to the Twelve Tables, "*The authority against an enemy is perpetual.*" (z) Here we see the whole clue of *Hospital's* reasoning. The maxims of the world must have settled that

(z) Camden. 98.

whatever is fixed by Treaty, must be enjoyed as by positive consent ; but the Roman law having also settled the “ *Adversus Hostem* ” “ *Æterna Auctoritas*, ” (a) it gave a colour and turn to the whole of the French reasoning.

I know not whether *Hobbes* had this *Æterna Auctoritas* in view, when he gave to the world his celebrated Treatise, in which he so much insists that the state of war is the natural state of mankind ; but such a position was by no means calculated to improve the Law of Nations, or to bring men to any thing like a sense of what it ought to be. “ Every independent Commonwealth,” says this philosopher, “ *has a right to do what it pleases to other Commonwealths.* And withal they “ live in the condition of a perpetual war, “ and upon the confines of battle, with their “ frontiers armed, and cannons planted against “ their neighbours round about.” (b) *Hobbes’s* book appeared but a little time before the Treatise of *Grotius*, and we may suppose how calculated such a fundamental maxim was, to improve the intercourse of nations.

(a) *Cicer De Offic. L. i. c. 12.*

(b) *De Cive, c. 2.*

Upon the whole then, during this time, the Law of Nations continued to be fluctuating in nearly as much uncertainty as ever, and was left, as we have seen, to be applied as it accommodated itself with the interest or caprice of those who were most concerned. And although men had become more enlightened, and saw the necessity of having some fixed principles which might govern *all* States, as particular laws governed particular communities; still so many impediments arose, while thus divested of good general principles, from power, ambition, and even religion, (perverted as it was from its original simplicity,) that though a certain conduct in certain situations was obviously necessary, yet the reasons for it lay buried in obscurity, and it was rather to be hoped for than expected. (c) Hence so many cases whose arguments and decision appeared to clash together; hence a new doctrine upon almost every new system of politics, or whenever a new character appeared in the world; hence also the cruelty, bigotry, want of good faith, and chicanery which were every where practised, and which almost form the characteristic of

(c) Artis formam ei imponere, multi antehac destinant, perfecit nemo. Grot. Prolegom. 30.

the ages we have reviewed. It is said that our *Lord Bacon* was the first who perceived the imperfection of the *science* of the Law of Nations, and the necessity there was for the happiness of the world, that the rules which governed its conduct should be reduced to fixed principles. *Albericus Gentilis* had indeed put out a book which made something like the attempt, but not only it is not sufficiently general when left to itself, but he cramps himself by supposing the Roman law to be the Law of Nations: above all, he is accused of resting upon doubtful authorities, which were promulgated, not so much to settle the truth, as to flatter those who consulted them, and of leaving several very noble questions totally untouched. (d) Many of the same objections were to be made to *Balthazar Ayala*, to whom however, as well as to *Gentilis*, Grotius allows considerable merit. As for the other Jurists who had attempted to treat of this subject, such as *Victoria*, *Henry de Gorcum*, *Lupus*, *Aria*, and various others, they, according to GROTIUS, *de uberrimo argumento, paucissima dixerunt*, and made no distinction between the natural or the positive, the divine or the civil, or the canon laws. (e)

(d) Grot. Prolegom. 38.

(e) Id. 37.

This jumble indeed, which was made between very different sorts of law, was the stumbling-block, according to the great father of the science, of all those who had hitherto attempted to treat regularly of the Law of Nations. At the same time it is rather remarkable, that in his survey of the writers who preceded him, he makes no mention of *Suarez*, the clearest of all those who had attempted to discuss the law of nature, and the difference between it and the Law of Nations. Had he gone on to treat of the minutiae of that latter law, the labours of Grotius might probably have been much shortened. The extracts of this writer of the sixteenth century, may possibly be recollected by the reader in the First Chapters of this work. With all these objections to the Doctors of the time, are we to regret or not, that the Universities of England had put forth nothing upon the subject of this interesting science?

It was in the midst of this uncertainty about true principles, and this dearth of proper authorities, that the philosopher of *Delft* rose like a star amid the surrounding darkness, and with an ability and happiness peculiar

peculiar to himself, had at once the honour of inventing and bringing his system to perfection : For he gave to the world a Treatise which has stood the test of time.

During the life of this great man, a civil war had desolated the finest provinces of his country, and like other civil wars which are continued to any length, had degenerated into the most horrible licentiousness and personal hatred. He had besides this, observed throughout the Christian world, a cruelty and injustice of which, to use his own words, even barbarians might be ashamed. War was denounced upon the slightest, or without any cause at all, and arms once taken, all reverence for laws human or divine was laid aside; "as if," says he, "an edict had been published for the commission of every sort of crime." (f) With many philosophers, this threw things into the other extreme, and the amiable and learned *Erasmus*, a man who is described as "*Pacis Ecclesiasticæ et civilis amantissimus*," endeavoured to prove that all wars whatsoever, were illegal under the Christian Dispensation.

(f) Grot. Prolegom. 28.

GROTIUS saw the disadvantages of the two extremes, and he had well discerned the total want of science both in antient and modern times, in the methods pursued to obtain a knowledge of the duties of Nations. He therefore resolved to give his labours to the improvement, or rather to the invention of a code of laws, which might go to the bottom of things, and supply authorities where authorities were wanting, to almost every case in the conduct of nations which could happen. And eminently qualified he was for this most noble and beneficial of all tasks. To the strongest mental powers, he added a learning which on almost every subject, and in every language was stupendous, and supported it by the most indefatigable industry, a virtue incorruptible, and the purest zeal for Christianity.

The world are perhaps indebted to the misfortunes of this wonderful man, for the Treatise *De Jure Belli et Pacis*. Having entered warmly into the theological disputes between the *Arminians* and *Gomarists*, which arose about his time, he was involved in the well known oppression of the Pensionary *Barneveldt* and the *Arminians*, by the Prince of Orange. The *Gomarists* having shewn much disposition

tion to tumult and insurrection, *Barnevelt* procured a decree from the States by which the Magistrates of the different cities were permitted of their own authority to levy troops for their protection. This alarmed the Prince, who conceived that his prerogative as Captain General was thereby invaded, and having before observed the strong opposition of *Barnevelt* to all his views of ambition, he now resolved upon his destruction. He therefore disbanded the new levies, and joining with the Gomarists, prevailed in the end in procuring the execution of the Pensionary, and the destruction of his party. *Grotius*, as one of the most active of them, was condemned to be shut up for ever in such prison as the States should think fit, and with this prospect before him, he entered the fortress of *Louvestein* in the year 1619.—He was here, however, allowed the use of his library, and the company of his wife, a woman who seems to have been illustrious for various qualities, but for none more than those which peculiarly compose the province of female virtue. She was justly and eminently celebrated for resignation, fidelity, and conjugal tenderness, and at the same time for a very noble firmness and address. It was by the exertions of these

these qualities that she procured the escape of her husband. Through her means, he was carried out in a chest by his own guards, and she remained herself for some time voluntarily exposed to the resentment and indignation of his enemies.---He afterwards retired to France, where at Balagni, near Senlis, the house of the President *de Mesmes*, a man of high reputation in the law, he composed, in 1625, the most noble of his labours. (g)

The method which he pursued in order to produce a work, which, although coming from a private man, should have the weight of a code of laws with Princes, he has himself expounded to us with great clearness in the preface. He found it necessary to get at some certain fixed principles which should be acknowledged to be such by all who read them. In order to do this, he was obliged to survey all the codes of morality and of general law which had ever been known: he penetrated into all the sciences between which and his own, he could discover any analogy; and he examined the opinions of all great men of whatsoever class, from which he could extract any thing like a community of

(g) Vie de Grot. par Burigny, L. 2.

sentiment. This, being properly arranged under its different heads, together with the vast additions of his own learning, and the support of all that could be drawn from history by way of precedent, he ventured, with very noble ambition to imagine might be received by the world as the rule for their duty in the most critical predicaments. The event answered all his expectations !

The work of *Grotius*, therefore, has for its support, all that the Philosophers, the Poets, the Orators, and the Critics of antiquity or of modern times can furnish. It is aided by all the lights which can be drawn from the famous civil and canon laws, cleared from its defects and the false glosses which had been put upon it by corrupt or ignorant interpreters ; above all, it is finally corrected and stamped with authority, by the indications of the divine will, as collected from the inspired writers of the old and new Testaments, from the comments of the Hebrew divines, and the authority of the fathers. (b)

(b) Prolegomen, 40. to 56.

It

It is not surprising that a code thus supported, should have immediately advanced into celebrity, and put down in the end those various heterogeneous compositions which had till then formed the rule of conduct for nations, and occasioned many of those discordant arguments and cases which we have related. The Elector Palatine, CHARLES LEWIS, was the first Prince who had the honour to be the real patron of the work; for although it came out dedicated to LEWIS XIII. yet it was strangely neglected by that King, who gave no reward to the author. The Elector, however, struck with its utility, ordered it to be taught publicly in his University of *Heidelberg*, and founded a Professor's chair, for the express purpose of teaching the *Law* of NATURE and of NATIONS. At the same time the envy of the Learned was almost equal to the merit of the writer. Parties were formed amongst them for the attack and the defence of the code, and those who defended it were stigmatized with the name of *Grotians*. All this was not uncommon; but what will be the ideas of those who are versed in this excellent Treatise, when they are told, on the authority of *Barbeyrac*, that such was the

the prejudice against it, that it was supposed to be calculated to annihilate the three great principles of the Roman law, "HONESTE VIVERE; NEMINEM LÆDERE; SUUM CUIQUE TRIBUERE." (i) To such a height of error can prejudice and old habits carry us.

The sound strength of GROTIUS, however, soon overcame such puny opposition, and he had the satisfaction of observing the progressive reputation of his code. It became very early the favourite study of the great GUSTAVUS, who is said to have found as much pleasure from it, as ALEXANDER found from reading the poems of HOMER, and who proved his admiration of the author, by ordering him to be called to the public employments of Sweden. In 1656, it was taught in the University of *Wittemburg* as public law; and in about sixty years from the time of publication, it was universally established in *Christianendom* as the true fountain-head of the *European Law of Nations*. (k)

We may suppose, however, that the minds of men being now called to new and im-

(i) Barbeyr. Pref. to Grot.

(k) Ib.

portant matters, did not let the subject pass off without adding their labours to its elucidation. Accordingly, innumerable commentaries were written upon it with various success, some of which have arisen to authority, although the most of them have died away, and are forgotten. Two great works, however, have been founded upon the Treatise, *De Jure Belli et Pacis*, which have deservedly attained to such celebrity and weight, that we cannot finish our subject without giving a place in it to their authors. The first is the famous work of PUFFENDORF; the second, of VATTEL.

Although GROTIUS had taken a most extensive range, and endeavoured to search the duties of nations in war and peace to the bottom; yet the lovers of abstract reasoning, independent of particular application, found that there was something wanting to the perfection of his science. He had entitled his work, *The Laws of War and Peace*, in order, says Barbeyrac, (1) to engage the attention of Statesmen and Generals, whom it most con-

(1) Barbeyr. Pref. to Grot.

cerned to understand them. He was forced, therefore, to plunge at once into his subject; and although, as he goes along, he satisfies his readers as to the reasons for their duty, yet it is by arguments taken up as it were *pro re nata*, the elements of which are supposed to be already understood; or if elementary principles are necessary for the elucidation of the point before him, a long discussion branches out from the immediate subject, which we feel would be better disposed of somewhere else: in the same manner as if, in proving a proposition of *Euclid*, we had not gone over the preliminary propositions on which it was founded, but were obliged to stop in the middle of it, to prove the fundamental position.

It was to remedy this defect in method, that *Puffendorf*, many years after *Grotius*, took up the subject anew; and, beginning with the system of human nature, endeavoured to analyse the heart and mind of man as independent of society, before he came to enquire into his duties as a citizen. The whole, therefore, of what is called MORAL PHILOSOPHY, was set forth in detail by this
great

great writer, as a proper supplement to what was wanting in GROTIUS, and as the true foundation of the public duties of nations.

These two works together, formed, for a long time, and form still, the sources to which all Statesmen and Moralists must look for the resolution of difficulties, and the direction of virtue. They are, however, not totally without objection, although the objection is applicable more to their manner than their matter; more to the accidents of time and place, than to their intrinsic worth. In the first place, they seem to labour too much under the heaviness of form, which characterises most forensic treatises. Their speculations are, besides, loaded so much with quotations, that they are absolutely weighed down by them, and the progress of the reader to the end proposed, is inconceivably impeded. Not to mention that the work of *Puffendorf*, although it supplies the method which was wanting in *Grotius*, possesses not, perhaps, that brief perspicuity which in a long course of reasoning is so desirable. In addition to this, it has been supposed that the views which these two great men have taken
of

of their subject, have not actually been so clear or so extensive as they might be. *Grotius* is imagined, in making the strong separation which he does between the Law of Nature and the Law of Nations, to have confined the latter too much to actual convention. *Puffendorf*, in affirming that the Law of Nations is *exactly* the same as the Law of Nature obeyed by individuals, only applied to states, instead of men; is thought not to have entered deeply enough into the matter. For it is contended, that the particular application of this Law to Nations, is susceptible of various modifications, according to the different nature of the subjects on which it has to work, and which consequently renders the detail and minutiae of it different from the mere Law of Nature as obeyed by individuals. Hence, therefore, something was still supposed to be wanting to the perfection of the science. (m)

It was this which gave rise to the Treatise of *VATTEL*, who, in his preface, has entered nicely into all these distinctions. Whether his objections to *Grotius* and *Puffendorf* were so weighty, as alone to render a new code necessary, it is perhaps needless to en-

(m) *Vattel* Dr. des Gens. Pref.

quire. Certain it is, that the world is obliged to him for a very complete work, the model of which is more light and elegant than that of those heavy though magnificent structures which we have surveyed; for he has thoroughly cleared them from the cumbrous ornaments which were supposed to adorn them, and has rendered the way into the interior less difficult and obscure. His method is excellent: he marshals, in the outset, a series of preliminary principles, on which he professes to found all his future reasoning, and to which, in the course of it, he regularly refers. Whether his preliminaries, however, will always bear out his conclusions, it does not come within our intention to examine. At the same time one objection may, I think, fairly be made to him, which is, that he is too general, and often too slight, in his reasoning, and attends too little to its particular application; a mode for the most part unsatisfactory, and frequently dangerous. It is perhaps a consequence of this, or to avoid the opposite fault of his two predecessors, that his work, though stored with excellent argument, is not sufficiently supported by the authorities of cases, without which even the reasoning upon natural law will want much useful

useful elucidation, but which forms the very essence and base of all that concerns what he calls the *positive* Law of Nations. (n)

The Treatise of *Vattel*, therefore, does not appear by any means to preclude the necessity of studying the works of his masters. Whoever, indeed, would understand his subject thoroughly, and become acquainted with the Law of Nations in all its nicety and extent, let what will be his own stores of knowledge, or the depth of his thought, can hardly arrive at the end he proposes, without giving all his mind to the Treatises of those wonderful men.

And thus I have done with the account of this interesting Law, after having endeavoured, possibly with too great minuteness of attention, to trace its progress in Europe through all its various revolutions. We have seen it, comparatively regular, though cruel, under the *morality* of the Greeks and Romans. We have marked its annihilation under the followers of ODIN, and a barbarous religion: we have beheld it reviving under the influence of Christianity! At the same time I have attempted to point out the effects of all local

(n) *Vattel* Dr. des Gens. Pref.

circumstances upon that part of it which is *positive*; to trace the account of the uncertainty of the doctrines concerning it, till it is to be found resting at last upon sure ground, under the pilotage of the great Jurist of the last century. The vast body of materials which has been brought together, has spun out the work to a length far beyond my expectation; yet I have purposely past aside a variety of interesting topics, and some very noble questions. I have done this, as well from the want of leisure from other occupations, as from the fear of fatiguing the reader; nor am I insensible how little qualified in many points I have been, for the execution of a work, whose subject at least must for ever be of consequence to mankind. Yet am I not totally without the hope, that those who are fond of investigating the nature of their species as it is to be found in their actions, or who, not content with what is, are willing to be told what was, and how it came to be, will not absolutely throw away their time in perusing what is now with great diffidence committed to the world.



